

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: MAY 10 2005

EAC 05 182 34117

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

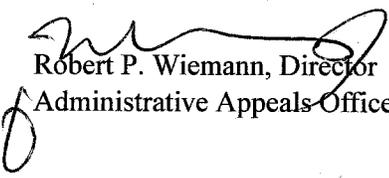
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Vermont 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 company organized in the State of New York in August 2000. It imports and consigns European antiques for sale. It seeks to employ the beneficiary as its president. 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.

On April 21, 2004, the director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive position for the U.S. entity.

On appeal, counsel for the petitioner asserts: it is erroneous to deny the petition based upon the size of the petitioning entity; that the director ignored that the beneficiary had been classified as an L-1A nonimmigrant; and, that the director's decision failed to consider the substantial and descriptive evidence submitted detailing the executive nature of the beneficiary's duties.

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 issue in this proceeding is whether the petitioner established that the beneficiary would be employed in an executive capacity for the petitioner. The petitioner does not claim that the beneficiary will perform primarily managerial duties but rather will perform primarily executive duties.

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 February 13, 2003 letter appended to the petition, the petitioner described the beneficiary's duties as follows:

In his capacity as President he is responsible for overseeing the management of the business and the execution of business policies and strategies of [the petitioner]. He makes key hiring decisions. He negotiates with dealers, interior designers and prospective buyers, galleries and auction houses. He develops consignment agreements with clients such as Schiller and Bodo, [redacted] [a]nd [redacted] Ltd. In addition, [the beneficiary] is responsible for setting the goals of the company which include enlarging the company's position in the market, maximizing profits in the sale of rare and valuable furniture and art work, and expanding the operations on the West Coast. He finalizes agreements, sets prices and dictates the parameters of deals.

[The beneficiary] provides direct supervision to the employees who perform the day[-]to[-]day functions and business activities of the company. He oversees the import and sale of antiques. He maintains current information on market demand and the competition which assists him in establishing, modifying and refining the goals of [the petitioner]. Finally, he is in charge of estimating the short-term and long-term financing needs of [the petitioner], and is responsible for developing strategic alliances with antiques dealers, galleries and auction houses.

The petitioner also submitted job descriptions for its three claimed employees. The petitioner indicated the secretary of the organization would establish a connection between the company and interior designers. The petitioner indicated that another individual acted as the petitioner's sales representative for the Northeast region and had been able to develop contacts with antique dealers and was expected to increase his account list. The petitioner indicated the third individual acted as the petitioner's sales representative for the West Coast and had introduced the petitioner's merchandise to a chain of storeowners. The petitioner provided its New York Form NYS-45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Form, for the fourth quarter of 2002. The New York Form NYS-45 listed three employees, the beneficiary, the individual identified as the organization's secretary, and the sales representative for the Northeast region.

On September 4, 2003, the director requested the petitioner's organizational chart and complete position descriptions for the petitioner's United States employees. The director also requested a comprehensive description of the beneficiary's proposed duties and how the duties would be managerial or executive, as well as how the beneficiary's subordinate staff would relieve him from performing non-qualifying duties.

In a November 28, 2003 response, the petitioner indicated that the beneficiary spent: 10 to 20 hours per week "establishing, cultivating, and solidifying [the petitioner's] business relationships with dealers;" 12 to 15 hours per week "liaoning [sic] with Italian suppliers, creating and overseeing marketing strategies, and making important pricing and inventory [sic] decisions;" five to seven hours per week "estimating the short-term and long-term financing needs" and "developing strategic alliances with other antique dealers, galleries and auction houses;" and, five to ten hours per week on strategic planning involving expansion plans, opening a second warehouse in California, importing a second line of antiques, and establishing an online presence.

The petitioner noted that the petitioner's secretary advised clients on interior design projects, established contact with interior decorators, designers and architects, finalized sales, identified consignment opportunities, and supervised the sales manager. The petitioner indicated that the sales manager was responsible for the sales operations, analyzing sales statistics, developing contacts with antique dealers, and supervising the sales representative. The petitioner claimed that the sales representative established contacts with clients, marketed the parent company's products, finalized sales, performed administrative functions, arranged shipments of merchandise, prepared invoices, and identified consignment opportunities.

The director determined that the petitioner had insufficient personnel to relieve the beneficiary from performing primarily non-managerial duties. The director noted that the beneficiary's position would be considered a first-line supervisory position over the secretary, sales manager, and sales representative, if the organization were a larger organization. The director also observed that the individual in the beneficiary's position spent 10 to 20 hours per week establishing, cultivating, and solidifying [the petitioner's] business relationships with dealers and that these duties were not considered managerial. The director further observed that other of the beneficiary's duties also involved sales or providing a service. The director concluded that the beneficiary would be engaged primarily in the non-managerial operational tasks required in any small company, with occasional first-line supervisory duties over non-professional employees.

On appeal, counsel for the petitioner asserts that the beneficiary's duties are executive. Counsel cites several unpublished decisions in support of his assertion and argues that the beneficiary's duties in this matter are similar

to the duties outlined in the unpublished decisions. Counsel also takes issue with the director's determination that the petitioner had not grown to a size capable of supporting a managerial or executive position. Counsel cites unpublished decisions and district court decisions to point out that a petitioner's size alone without taking into account the reasonable needs of a petitioner cannot be the determining factor in denying a visa to a multinational manager or executive. Counsel acknowledges the decision in *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003) but distinguishes the matter at hand by noting that the beneficiary had been approved for L-1A classification on three separate occasions making it unlikely that all three L-1A visa classifications would have been issued in error. Counsel also cites *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) for the proposition that Citizenship and Immigration Services (CIS) has a duty to explain the inconsistency between the grant of the L-1A visa and the denial of Form I-140 petition when the same facts have been presented in both applications.

Counsel's assertions are not persuasive. First, 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's initial description of the beneficiary's duties indicates he is the individual who "negotiates with dealers, interior designers and prospective buyers, galleries and auction houses," and who "develops consignment agreements with clients," and "is responsible for developing strategic alliances with antiques dealers, galleries and auction houses." These duties describe an individual who is performing the basic operational task of generating 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).

The remaining portion of the description borrows liberally from the definition of executive and managerial capacity, are general, and does not convey an understanding of the beneficiary's daily duties. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). See also section 101(a)(44)(B)(i) and (ii). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner's initial description of the three employees under the beneficiary's supervision describes two salespersons and an individual who is marketing the petitioner's services to interior designers. The descriptions do not extend the duties of any of these three individuals to supervision of other employees. The petitioner also does not provide a New York Form NYS-45, substantiating the employment of four employees rather than just the beneficiary, a part-time secretary, and a part-time sales representative.

The petitioner's response to the director's request for a more comprehensive description of the beneficiary's duties does not clarify how the beneficiary's job duties are primarily executive. As observed by the director, the petitioner's description of the beneficiary's duties suggests that the beneficiary spends his time performing the operational services necessary to establish the petitioner in the antique furniture business. The beneficiary performs the daily pricing, inventory, and marketing tasks. In addition, the petitioner amends the beneficiary's subordinates' duties in response to the director's request for evidence adding a supervisory component to two of the beneficiary's subordinates. A petitioner may not make material changes to a petition

in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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). The AAO acknowledges that the descriptions of the beneficiary's subordinates' duties involve selling the petitioner's product; but the record does not establish that the beneficiary's subordinates relieve the beneficiary from providing the daily functions necessary to operate the petitioner.

Counsel's citation to unpublished decisions and assertion that the description of the beneficiary's duties in this matter are similar, carries little probative value. Upon review of the totality of the record, including the nature of the petitioner's business, the descriptions of the beneficiary's subordinates' duties, and the actual duties the beneficiary performs, the petitioner has not established that the beneficiary in this matter performs in a primarily executive capacity. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

Counsel correctly observes that 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. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size or the absence of employees who would perform the non-managerial or non-executive operations of the company. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of operational tasks including establishing business relationships with dealers, marketing the petitioner's product, performing the petitioner's financial operations, and operational tasks associated with expanding the petitioner's business. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N at 190. Based on the current record, the AAO is unable to conclude that the description of the beneficiary's duties describes primarily executive duties rather than the operational tasks associated with an antique dealership.

Counsel contends that the director's review of the matter on three prior occasions in the petitioner's nonimmigrant petitions resulted in approval of the beneficiary's managerial and executive capacity. Counsel, citing *Omni Packaging, Inc. v. INS*, asserts that CIS failed to specifically explain how the three previous adjudications were in error. However, the court in *Omni Packaging, Inc.* later determined that the Immigration and Naturalization Service had properly denied the immigrant petition and that it was not estopped from finding that the alien was not a manager or executive after having determined that he was

manager or executive for purposes of issuing an L-1 visa. *See Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996).

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). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. 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.

It must be noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form 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. at 1103. Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L1-A 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). Although counsel may find it unlikely that CIS would approve three nonimmigrant petitions in error, such erroneous approvals occur, for the reason noted above.

Furthermore, 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). The record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Counsel should further note that the AAO 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*, 19 I&N at 597.

Beyond the decision of the director, the petitioner has provided confusing information regarding the qualifying relationship between the petitioner and the beneficiary's foreign employer. The petitioner indicates that the beneficiary owns 100 percent of the foreign entity and 50 percent of the petitioner. The record also shows that the petitioner has elected to file Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation.

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.

To establish eligibility in this matter, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

Further, to qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation or individual owns it in any part. This conflicting information has not been resolved. Moreover, the New York Form CT-6, Election by a Federal S Corporation to be Treated As a New York S Corporation, signed on behalf of the petitioner indicates that the beneficiary owns 50 of the petitioner's shares, conflicting with the petitioner's stock certificate number 1 showing the beneficiary owning 10 of the petitioner's shares. The record does not establish that the petitioner and the foreign entity are affiliated.

Also beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered annual wage of \$40,000.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has previously paid the beneficiary \$24,000 per year, a portion of the proffered wage but has not established by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage. The petitioner also has not provided its Internal Revenue Service Forms 1120 or audited financial statements to substantiate its ability to pay the proffered wage.

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).

ORDER: The appeal is dismissed.