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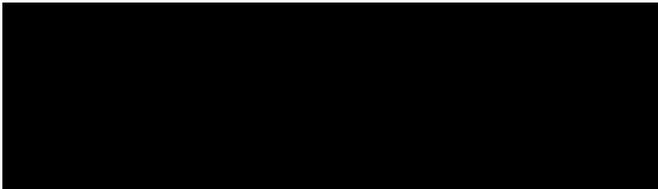
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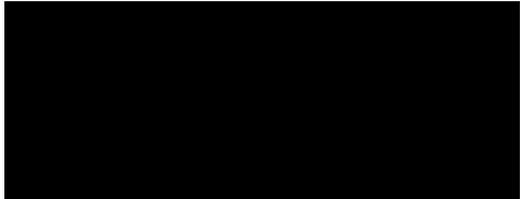
Office: CALIFORNIA SERVICE CENTER

Date: NOV 23 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

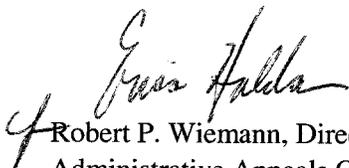
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 corporation organized in the State of California in February 2001. It markets and sells clothes. 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.

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 petitioner.

On appeal, counsel for the petitioner asserts that the director's denial is based on speculation and is arbitrary, capricious, ignores the evidence submitted, and displays an unlawful prejudice against smaller employers.

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 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 an April 24, 2004 letter appended to the petition, counsel for the petitioner listed the beneficiary's accomplishments as an L-1A executive as:

1. [R]ealized \$804,006 in sales in its second year in business and \$305,803 in sales in its first full year in business[;]
2. [H]ired four people[;]
3. [P]ublished two English language catalogs of products[;]
4. [P]romoted the products of the parent company through the retention of a sales rep[;]
5. [S]igned a new lease extension for a further one year periods[sic] [;]
6. [S]uccessfully launched its product line despite the worst recession in the USA in 20 years[; and,]
7. [C]reated a website for interested American customers[.]

Counsel also noted that the beneficiary was able to "direct the business strategy of the company in line with the overall international goals of the parent company" which required "significant coordination between the manufacturing operations and the U.S. office."

Counsel also provided, among other items, the petitioner's 2003 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return showing \$48,000 paid to the beneficiary as officer's compensation and \$44,400 paid to other employees. The petitioner's California Form DE-6, Employer's Quarterly Wage Report for the quarter ending March 31, 2004 showed the petitioner employed five individuals including the beneficiary.

On January 28, 2005, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary spent on each listed duty and an explanation of what the beneficiary did and would do in the day-to-day execution of her duties; an organizational chart describing its managerial hierarchy and staffing levels and listing all employees under the beneficiary's supervision by name and job title, and including a brief description of their job duties; and the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the last four quarters that were accepted by the State of California.

In an April 21, 2005 response, the petitioner stated:

[The beneficiary] has and will continue to develop and establish policies and objectives for the entire US business organization and structure the operations in accordance with board directives and the corporation charter. She reviews activity reports and financial statements to determine progress and status in attaining objectives and revises plans and approaches in accordance with current economic conditions. She reviews operational and financial reports to determine needed policy changes. She evaluates performance of the overall operation for compliance with established policies and objectives of the company. She reports findings to the President of [the parent company].

The petitioner also stated that the beneficiary managed and directed the following "areas" of the business:

1. Profit & Loss responsibility to ensure profitability by managing sales revenue and costs.
2. Formulation of policies and corporate goals in areas of general business development, marketing, and distribution guidelines to domestic customers.
3. Major decision making and planning of strategy of business expansion including the acquisition of business opportunities to enhance the competitiveness of the subsidiary[.]
4. Provide feedback to parent company on technical and business info requested by it.
5. Coordinate interfaces between the Company and major customers, distributors, and overseas affiliate.
6. Guidance on import contracts with buyers, as well as distribution contracts[.]
7. Oversee business presentations to new and existing customers.
8. Provide strategic guidance on warehousing and retail channel distribution logistics.
9. Hire and fire managers[.]

The petitioner also expanded on the initial description provided by counsel and added that the beneficiary "adjusted business strategy to fit the North American market conditions," and "directed the promotion of products of the company through trade shows."

The petitioner provided its organizational chart showing the beneficiary in the position of president, responsible for "marketing planning," supervising operations, and client management. The beneficiary's subordinate accounting manager was described as responsible for accounts receivable, accounts payable, payroll, and inventory management. The beneficiary's subordinate "director" was described as responsible for marketing operation and supervising the "operator" and customer service employee. The organizational chart depicted the "director" over an "operator" who was responsible for international trading-LC (letter of credit) management with banks, audit orders, and traffic control, and a customer service clerk who processed client complaints and recommendations.

The petitioner's California Form DE-6 for the second quarter of 2004, the pertinent quarter in which the petition was filed, confirmed the employment of five individuals, however the name of the individual identified as the accounting manager on the organizational chart did not correspond to any of the names on the petitioner's California Form DE-6. The salaries of the "operator" and the customer service clerk suggested that these individuals were employed part-time.

The director denied the petition on May 20, 2005, determining that: (1) the record did not establish that the majority of the beneficiary's duties would be primarily directing the management of the organization; (2) because the petitioner would have only one other full-time employee and two part-time employees, it was reasonable to believe that the beneficiary would be assisting in the performance of numerous menial tasks; (3) the beneficiary's performance of menial duties precluded the beneficiary from being considered an executive; (4) the record did not establish that the beneficiary would manage a subordinate staff of professional, managerial, or supervisory employees; and, (5) the petitioner did not have a reasonable support staff to relieve the beneficiary from performing non-qualifying duties and had not demonstrated that the petitioner could realistically support a position requiring primarily managerial or executive responsibilities.

On appeal, counsel for the petitioner references two previous approvals for the beneficiary's eligibility as an L-1A intracompany transferee. Counsel recites the statutory definition of "executive capacity" and contends that the record contains specific examples establishing that the beneficiary's duties satisfy the criteria set out in this definition. Counsel asserts that the director does not substantiate his conclusion that the beneficiary would necessarily be involved in non-qualifying duties. Counsel notes that the petitioner has four employees who work according to the beneficiary's executive direction and that there is no reason for the beneficiary to perform primarily menial tasks. Counsel concludes that the director's decision is arbitrary and exhibits prejudice against small employers.

Counsel's assertions and claims are not persuasive. As counsel observed, when examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In this matter, the petitioner has provided a general description of an individual responsible for hiring staff, creating promotional materials through catalogs and websites, signing contracts on behalf of the petitioner, promoting products, and launching a product line. This general description is not sufficient to establish that the beneficiary is responsible for tasks that are associated primarily with managerial or executive tasks rather than providing the daily operational tasks necessary to establish and operate a 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). Further, although counsel and the petitioner indicate that the petitioner has hired a sales representative, the petitioner's organizational chart does not identify a sales representative position and the descriptions of the beneficiary's subordinates' duties do not include sales duties. 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 petitioner's indication that the beneficiary will develop and establish policies, review activity reports, financial statements and reports, operational reports, and evaluate the performance of the overall operation do not provide sufficient further detail to conclude that the beneficiary's primary tasks are managerial or executive. The petitioner does not adequately define the petitioner's goals, or clarify who actually negotiates contracts, makes presentations to customers, and sells the petitioner's products. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives, such as ensuring profitability and planning business expansion are 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 will 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).

Moreover, a critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. For example, the petitioner claims that the beneficiary directs and manages sales activities through the employment of a sales representative but the petitioner does not identify anyone on its organizational chart that participates in trade shows or makes presentations to customers. Nor does the petitioner provide evidence of employees who perform importing, warehousing, or administrative tasks. In addition, as the petitioner employs only the

beneficiary and one other full-time employee, CIS must assume that the beneficiary herself is assisting or performing first-line supervisory duties over the full-time and two to three part-time workers. The petitioner bears the burden of establishing the beneficiary's duties are primarily managerial or executive and 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. at 165; *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The AAO acknowledges that the beneficiary as the petitioner's senior employee will perform some managerial or executive functions; however, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, despite the director's request for an allocation of the beneficiary's qualifying and non-qualifying duties, the petitioner failed to provide this information. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Such evidence is important in this matter because several of the beneficiary's tasks, such as coordinating the foreign manufacturing operations and the U.S. office, coordinating interfaces between the petitioner and major customers, distributors, and the overseas affiliate, tasks associated with import contracts and distribution contracts, and business presentations to new and existing customers, do not fall directly under traditional managerial or executive functions as defined in the statute. Given the lack of the percentages regarding qualifying and non-qualifying duties, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

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). Upon review of the totality of the record, including descriptions of the beneficiary's duties, the duties of her subordinate employees, the nature of the petitioner's business, and the employment and remuneration of employees, the petitioner has not established that the beneficiary's duties and those of her subordinates elevate the beneficiary's proposed position to a primarily managerial or executive one.

Counsel's assertion that the director exhibits prejudice against small employers is not persuasive. While 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, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Such other relevant factors include a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. 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.*

In this matter, the petitioner has confirmed the employment of the beneficiary, a "director," whose tasks consist of "marketing operation" and supervising two part-time employees, a part-time "operator" who audits

orders, letters of credit, and performs traffic control, and a customer service clerk who processes complaints and recommendations. As noted above, the record does not contain sufficient evidence to determine the position of the fifth part-time individual employed the quarter the petition was filed. The record does not establish that the reasonable needs of the organization require the beneficiary's performance as primarily a manager or an executive 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 ill-defined and non-qualifying duties of the beneficiary. Moreover, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

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

The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, 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.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, 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. 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).

Moreover 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 does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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 Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, 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 petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

The AAO acknowledges counsel's request for oral argument. However, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Consequently, the request for oral argument is denied.

The petition will be denied for the above stated reason. 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.