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U.S. Citizenship
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Services

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FILE: [Redacted]
EAC 04 170 51045

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
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 The director's decision will be withdrawn and the matter will be remanded to the director for further consideration and entry of a new decision.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Maryland that is engaged in international trade. The petitioner seeks to employ the beneficiary as its managing director.

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

On appeal, counsel contends that the director violated the regulation at 8 C.F.R. § 103.2(b)(8), when he denied the petition based on insufficient evidence without first issuing to the petitioner a request for additional evidence. Counsel claims that the petitioner should be given "a reasonable chance" to demonstrate the beneficiary's eligibility as a multinational manager or executive, and submits documentary evidence in support of the claim that the beneficiary would be primarily employed in a managerial or executive capacity.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The AAO will address the issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the instant petition on April 30, 2004, noting that the beneficiary would occupy the position of managing director and would receive an annual salary of \$45,000. In an April 29, 2004 letter filed in support of the petition, the petitioner provided the following job description of the beneficiary's proposed position:

[The beneficiary] is in charge of assessing market reports and attending trade shows and exhibits to expand [the petitioner's] customer base. [The beneficiary] oversees compliance with regulatory requirements for importing goods from aboard [sic]. [The beneficiary] is in

charge of four employees who perform day-to-day work needed to provide services to [the petitioner's] customers. The actual non-managerial work, from receiving shipments, repacking and shipping to customers, and retail sales at the kiosk is carried out by [the petitioner's] employees, monitored and selected by [the beneficiary].

[The beneficiary] continues to develop and implement all necessary plans and policies for a successful operation. He has complete discretion over the day-to-day operations to ensure that the objective of expanding [the petitioner's] gross sales in a competitive U.S. market is achieved.

In addition to managing day-to-day operations, [the beneficiary] is personally responsible for developing new business ventures and negotiating contracts with wholesalers and retailers.

The petitioner submitted an organizational chart, on which it identified the beneficiary as the vice-president/director over the following lower-level positions: secretary-treasurer, administrator-manager, two salespersons, and a shipping-handling-deliveryman. The petitioner's quarterly wage report for the quarter ending December 2003 confirmed the employment of five workers.

In a decision dated December 29, 2004, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director noted that restating the statutory definitions of "managerial capacity" and "executive capacity" was not sufficient to establish the beneficiary's proposed employment in a qualifying capacity. The director further noted that it did not appear that the petitioning organization could support the beneficiary as a manager or executive, and concluded that the beneficiary would be "engaged primarily in the non-managerial, day-to-day operations involved in producing a product or providing a service." The director also stated that the petitioner did not provide a "comprehensive description of the beneficiary's duties" to demonstrate that the beneficiary would have managerial control over a department, component or subdivision of the company, or that the beneficiary would be employed at a senior level in the organization. Consequently, the director denied the petition.

In an appeal filed on January 28, 2005, counsel contends that the beneficiary would be employed by the United States entity as both a manager and an executive, and claims that Citizenship and Immigration Services (CIS) is estopped from adjudicating the petition based on the beneficiary's employment capacity. Counsel notes CIS previously approved two L-1A nonimmigrant petitions filed by the petitioner for the same beneficiary. Counsel claims that because CIS already considered the issue of employment capacity in its adjudication of the previous nonimmigrant petitions, it "is collaterally estopped from redetermining these same issues." Counsel cites *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) as authority for barring the AAO from reconsidering this issue.

Counsel also contends that the director erroneously denied the petition without first requesting additional evidence from the petitioner as required in the regulation at 8 C.F.R. § 103.2(b)(8). Counsel states that because the director's decision was based on a finding of insufficient evidence, the regulations require the director to issue a request for additional evidence. Counsel also references a February 16, 2005 CIS memorandum recommending CIS adjudicators to issue a request for evidence in cases "when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility." Counsel contends that the petitioner was not given a reasonable chance to resolve the director's concern of ineligibility. Counsel

further notes that had the director issued a request for evidence, the petitioner would have had twelve weeks within which to obtain evidence and resolve any questions of eligibility, rather than the thirty-day time period provided on appeal. Counsel states that the additional time would also have been "useful" to the petitioner in "establishing its case," and would have put it "in a better position" on appeal.

Counsel submits a significant amount of documentary evidence in support of the beneficiary's eligibility for the classification as a multinational executive or manager, including a February 24, 2005 letter from the petitioner. In this letter, the petitioner noted that the beneficiary's responsibilities in the United States entity include: (1) exercising "complete discretion in determining [the petitioner's] product line, customization options, and pricing of products"; (2) overseeing compliance of import regulations; and (3) possessing "complete discretion over day to day business operations." The petitioner explains that the beneficiary personally attends craft markets and trade shows to observe current furniture trends and prices, and to develop contacts with suppliers, and retail and wholesale customers. The petitioner states:

Based on market observations and trade shows, [the beneficiary] assesses new ventures with an eye to expanding [the petitioner's] product line to achieve out overall objective of increasing gross sales. New ventures currently being considered by [the beneficiary] include small furniture items featuring wood carving, stone carving and/or metal carving. To this end, [the beneficiary] has prepared sketches of nesting end tables, framed mirrors, and jewelry boxes, indicating where carvings may be appropriate, and sent the sketches to [the foreign entity] for a determination as to production costs.

[The beneficiary] is in charge of [the petitioner's] catalogue. He has complete discretion over catalogue details, including layout, color, and product placement. (See attached catalogue). To determine which items will be included, [the beneficiary] meets with wholesalers and retailers to determine their specific client preferences and then discusses these preferences with [the petitioner's] suppliers. [The beneficiary] reviews samples from the suppliers and then decides on which products will be featured in the catalogue. [The beneficiary] hires the printer in charge of producing the catalogue.

[The beneficiary] is in charge of expanding [the petitioner's] client base. To this end he uses the trade shows to meet potential buyers, and offers customized options to these potential retail and wholesale buyers based on knowledge of furniture production capabilities. Base[d] on his industry knowledge, [the beneficiary] determines prices for customization based on his knowledge of total costs of production. [The beneficiary] negotiates the initial contracts with wholesalers and retailers.

* * *

[The beneficiary] provides information to [the petitioner's] administrator concerning product line and prices. He provides lists of established customers to his administrator (supervisor) who provides this information to the employees so that they may follow up for additional orders. ([The petitioner's] administrator is a professional with a bachelor of Arts degree. See attached University certificate.)

* * *

[The beneficiary] is the driving force behind [the petitioning entity]. He understands every aspect of the business. He delegates to [the petitioner's] employees the day to day work associated with displaying products and manning the kiosk boutique, obtaining and receiving our products from suppliers, and making sure that the products are repackaged and delivered to our buyers. He also delegates to the employees the task of following up with existing buyers for future orders.

Upon review, the AAO will withdraw the director's decision and remand the petition to the director for further consideration and entry of a new decision.

As properly noted by counsel on appeal, the regulation at 8 C.F.R. § 103.2(b)(8) requires that:

[I]n . . . instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence.

Here, the director based his denial on insufficient documentation and improperly relied on the petitioner's 2002 corporate tax return as a basis for the denial. As the record at the time of filing did not contain any evidence of ineligibility, the director should have issued to the petitioner a request for additional evidence. *See* 8 C.F.R. § 103.2(b)(8). The AAO agrees that the evidence of record raises underlying questions regarding eligibility. In such an instance, the director "shall request the missing initial evidence, and may request additional evidence . . ." *Id.*

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The AAO notes a discrepancy in the evidence presented by the petitioner with regard to the beneficiary's proposed employment. On Form I-140, the petitioner noted employment of the beneficiary in the position of "managing director." However, the petitioner's organizational chart identifies the beneficiary as the "vice-president/director." The petitioner has not clarified the beneficiary's proposed position. Nor has the petitioner explained whether the job duties of the "managing director" differ from those of the "vice-president/director." Additionally, the record is deficient in demonstrating that the beneficiary would be primarily performing the managerial and executive job duties addressed by the petitioner. Based on the petitioner's representations, the beneficiary would be responsible for personally performing many non-managerial and non-executive functions of the petitioning entity, including its sales, marketing, advertising, product development, contract negotiations, and regulatory compliance.

Moreover, the petitioner's limited staffing structure indicates that the beneficiary would not be employed in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The record, as presently constituted, demonstrates that the reasonable needs of the organization are not plausibly met by the employment of the beneficiary plus a secretary-treasurer, administrator-manager, two salespersons, and a shipping and delivery clerk. The shipping and delivery clerk

is referred to by the petitioner as an "on-call" employee. The petitioner represents that its four lower-level employees perform the day-to-day "non-managerial work, from receiving shipments, repacking and shipping to customers, and retail sales," while the beneficiary primarily performs in both a managerial and executive capacity. The petitioner's limited view of "non-managerial work" fails to recognize the additional non-qualifying tasks of sketching new products, creating the company catalog, negotiating sales contracts, obtaining licenses, and marketing the petitioner's products, all of which are performed by the beneficiary.

With regard to the beneficiary's employment capacity in the United States, the director is instructed to issue a request for such relevant evidence as a statement clarifying the title and position to be occupied by the beneficiary, as well as a detailed description of the beneficiary's managerial or executive job duties. As the present record does not demonstrate that the beneficiary would be primarily performing managerial or executive job duties, the petitioner should explain how the beneficiary would be primarily employed as a manager or executive while still performing the above-outlined non-qualifying tasks of the business. Additional relevant information would include an explanation of how the petitioner's staffing levels at the time of filing the petition would be sufficient to meet its reasonable needs and to support the beneficiary in a primarily managerial or executive capacity, particularly in light of the fact that the beneficiary holds non-managerial and non-executive responsibilities. The record also lacks a description of the specific job duties to be performed by each lower-level worker employed at the time of filing the petition, which is essential to establishing whether the beneficiary is relieved from primarily performing the petitioner's day-to-day functions.

Although the director's decision will be withdrawn, the AAO acknowledges counsel's assertion on appeal that pursuant to *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991), CIS is collaterally estopped from denying the immigrant petition. Counsel states that based on the doctrine of collateral estoppel, the AAO cannot adjudicate the issue of managerial or executive capacity in connection with the instant immigrant petition, as it was already adjudicated by CIS in the approval of the petitioner's previous two L-1A nonimmigrant petitions. The Administrative Appeals Office, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338. (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. See, e.g., *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; see also 8

C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary.

Beyond the decision of the director, an additional issue is whether the petitioner established that the beneficiary was employed abroad in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. § 204.5(j)(3)(B). The petitioner represented in its February 24, 2005 letter that the beneficiary was employed abroad as the company's managing director, and performed such job duties as "design[ing] the chair prototype" to be sold by the foreign entity, creating wood bending machines used to construct the foreign entity's products, determining the "aesthetic look" and "color schemes" of the chairs sold, communicating with local and overseas buyers, including meeting dealers and attending trade shows, determining products to be marketed, and providing buyers with customized product specifications. The petitioner's representations establish that the beneficiary was involved in personally choosing, developing and marketing the foreign entity's products, rather than managing or supervising lower-level employees who are responsible for the non-qualifying business functions. The director should request such relevant evidence as a description of which employees perform the functions of the business, as well as an explanation as to how they relieved the beneficiary from primarily performing the above-addressed non-managerial and non-executive responsibilities.

An additional issue not addressed by the director is whether the petitioner established the existence of a qualifying relationship between the foreign and United States entities. The stock ownership information contained in the petitioner's April 29, 2004 letter and stock certificate does not correspond with that reported by the petitioner on Schedules E and K of its 2002 and 2003 Internal Revenue Service (IRS) corporate tax returns. The petitioner is obligated to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92 (BIA 1988). As a result, the director is instructed to request documentation in the form of stock certificates, stock transfer ledger, stock certificate registry, articles of incorporation, corporate by-laws, and the minutes of relevant annual shareholder meetings, which would clearly confirm the stockholders of the petitioning entity at the time of filing the immigrant petition. If the information reported on the petitioner's 2002 and 2003 IRS corporate tax returns is incorrect, the petitioner should also submit a certified copy of its amended tax returns reflecting its correct ownership.

It is emphasized that the 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, May 14, 2004. Documentation of business activity and hiring that occurred after the date of filing if not probative and will not be considered.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the beneficiary meets the requirements for this visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated December 29, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.