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FILE: WAC 04 055 51879 Office: CALIFORNIA SERVICE CENTER Date: OCT 17 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 March 2001. It imports and wholesales automotive radiators. It seeks to employ the beneficiary as its chief executive officer. 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On appeal, counsel for the petitioner cites two unpublished decisions and compares portions of the unpublished decisions to portions of the matter at hand. Counsel concludes that the facts of the matter at hand parallel the facts in the unpublished decisions and thus should result in finding that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel also notes that if staffing levels are used as a factor when determining whether an individual is acting in a managerial or executive capacity, the reasonable needs of the organization, component, or function, must be considered in light of the overall purpose and stage of development of the organization, component, or function. Counsel contends that Citizenship and Immigration Services (CIS) had no right to deny that the beneficiary in this matter acts in a managerial or executive capacity based solely on the petitioner's size.

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 a December 12, 2003 letter appended to the petition, the petitioner stated that the beneficiary would "oversee the executive management team and direct the day-to-day activities of [the petitioner's] corporate functions, including formulating current and long-range plans and objectives to ensure the international competitiveness of our company." The petitioner listed the beneficiary's duties and responsibilities as:

1. Managing the executive team including the General Manager, Sales Manager and other staff in the United States;
2. Formulating and overseeing the administration of corporate policies and standards by the General Manager, and overseeing the Sales Manager who will meet goals for [the petitioner];
3. Exercising a wide latitude in discretionary decision-making concerning all the U.S. operations to research and negotiate business development opportunities; including responsibility for ensuring the attainment of sales and profit goals, and maximizing return on investment capital;
4. Directing management staff to conduct [the petitioner's] business activities, including evaluation of new products, and overseeing communication of valued business propositions with buyers, engineers and the management;
5. Responsibility for an overall budget of more than \$100,000 for the company's business development projects, including evaluation of new and existing products to secure marketing and sales profitability.

The petitioner also provided its organizational chart showing a general manager, two administrative assistants, a sales representative, and a warehouse shipper. The petitioner indicated that: the general manager supervised daily operations, set prices for new products, and coordinated communications with the claimed parent company; one administrative assistant provided customer services, invoiced customers, input purchase orders and followed up on accounts receivable; the second administrative assistant kept accounts payable and provided office clerical support; the sales representative visited customers, solicited new customers, and designed advertising; and the warehouse shipper received inventory and shipping orders.

On November 19, 2004, 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 a description of the beneficiary's typical day; 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 fourth quarter of 2003 and the third quarter of 2004 that were accepted by the State of California.

In a February 10, 2005 response, the counsel for the petitioner indicated that the beneficiary would not be employed with the petitioner until the visa classification had been approved. The petitioner provided a percentage breakdown of the beneficiary's proposed duties:

Managing the executive team including the General Manager, Sales Representatives and other staff in the U.S. ensuring the competitiveness and leadership position of the Parent Company's business across two continents. (20 percent);

Formulating and overseeing the administration of corporate policies and standards by the General Manager and overseeing the Sales Representatives who will meet the company goals. (20 percent);

Exercising a wide latitude in discretionary decision-making concerning all U.S. operations to research and negotiate business development opportunities, including responsibility for ensuring the attainment of sales and profit goals, and maximizing return on investment capital. (20 percent);

Directing management staff to conduct the company's business activities, including the evaluation of new products, and overseeing communication of valued business propositions with buyers, engineers and the management. (15 percent);

Responsible for an overall budget of over \$100,000.00 for the company's business development projects, including evaluation of new and existing products to secure marketing and sales profitability. (15 percent); [and]

Assigning responsibilities and evaluating work performance of staff. Hiring, promotion, or discharge of employees. (10 percent).

The petitioner also included a revised organizational chart indicating that the chart covered the time period in which the petition was filed. The chart included the beneficiary's position as chief executive officer, the positions of general manager, two administrative assistants, sales manager, sales assistant, and warehouse shipper. The petitioner's California Form DE-6 for the fourth quarter of 2003, the quarter in which the petition was filed, showed five individuals employed in October and November and four individuals employed in December 2003. The names of the individuals listed on the California Form DE-6 corresponded to the names of the individuals listed on the organizational chart in the positions of general manager, sales manager, and one of the administrative assistants. The other names on the California Form DE-6 did not match any of the names listed on either organizational chart submitted.

The director determined that: (1) the petitioner's job description and organizational chart did not establish that the beneficiary performed primarily in a managerial or executive capacity; (2) it was reasonable to believe

with the petitioner's organizational structure that the beneficiary would be assisting with day-to-day non-supervisory duties; (3) the beneficiary's performance of menial duties precluded the beneficiary from being considered an executive; (4) the beneficiary's position would be, in essence, a first-line supervisory position over non-professional employees; and, (5) the beneficiary could not be considered a functional manager because it appeared he would be performing routine operational activities rather than managing a function.

As observed above, counsel's appeal consists of: (1) a comparison of the beneficiary's job description with portions of two unpublished decisions that found eligibility and a conclusion that the beneficiary's position should also be considered managerial or executive; and (2) an assertion that the CIS improperly denied the beneficiary's eligibility based on the petitioner's size.

Counsel's comparison and assertion are not persuasive. Counsel's citation to unpublished matters carries little probative value. Counsel's recitation of portions of job descriptions in unrelated matters does not contribute to an understanding of the beneficiary's proposed duties for the petitioner. When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Upon review of the record in this matter and as discussed further below, the petitioner has not established that the beneficiary's duties and those of his subordinates elevate the proposed position to a primarily managerial or executive position. Further, counsel should take note that unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

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). Counsel seems to suggest that the beneficiary qualifies as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. However, a petitioner may not claim a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[m]anaging the executive team" to ensure the competitiveness and leadership position of the parent company's business, "[f]ormulating and overseeing the administration of corporate policies and standards by the General Manager and overseeing the Sales Representatives who will meet the company goals," and "[e]xercising a wide latitude in discretionary decision-making concerning all U.S. operations to research and negotiate business development opportunities" to ensure attainment of sales and profit goals and maximize return on investment capital. The petitioner did not, however, adequately define the petitioner's goals, or clarify who actually researches and negotiates business opportunities. 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)). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased portions of the statutory definition of managerial and executive capacity. See sections 101(a)(44)(A) (i) and (ii) and sections 101(a)(44)(B)(ii), (ii), and (iii) of the Act. For instance, the petitioner depicted the beneficiary as "[m]anaging the executive team," "[d]irecting management staff," "[f]ormulating and overseeing the administration of corporate policies and standards," "[e]xercising a wide latitude in discretionary decision-making," "[a]ssigning responsibilities and evaluating work performance of staff" and "[h]iring, promotion, or discharge of employees." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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, 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 a "general manager," an administrative clerk, and a salesperson. The record does not contain sufficient evidence to determine the position of the fourth individual employed the month the petition was filed. 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). Moreover, the record does not provide sufficient detail to determine that the beneficiary's subordinates perform primarily managerial, supervisory, or professional duties. Although the beneficiary is not required to supervise personnel, for eligibility under this visa classification, if it is claimed that his 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.

Furthermore, 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 ill-defined duties of the beneficiary. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is 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. at 1108. 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.

Beyond the decision of the director, the petitioner has presented confusing evidence regarding the petitioner's qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. See section 203(b)(1)(C) of the Act.

The petitioner claims to be a majority owned subsidiary of [REDACTED]. The petitioner has provided two purchase agreements: (1) an agreement dated August 12, 2002, wherein the petitioner agreed to sell a 51 percent interest to [REDACTED] for \$100,000; and (2) a stock purchase agreement dated October 6, 2003, wherein an individual, [REDACTED] sold 2,550 shares to [REDACTED] the beneficiary's foreign employer, for \$25,500. The petitioner's 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, Schedule L, Line 22(b) shows the petitioner's common stock valued at \$50,000. The 2002 IRS Form 1120 indicates in a statement attached to the return that [REDACTED] owns 100 percent of the petitioner. The petitioner's 2003 IRS Form 1120, Schedule L, Line 22(b) continues to show that the petitioner's stock is valued at \$50,000 and a statement attached to the return shows that [REDACTED] owns 45 percent of the petitioner and that the beneficiary's foreign employer owns 55 percent of the petitioner. Although the record contains stock certificates and a document purportedly evidencing funds transferred from the foreign entity to the petitioner, the inconsistent evidence regarding the value of the petitioner's stock and the inclusion of two agreements relating to a sale of an interest in the petitioner disrupt the chain of title and casts doubt on the veracity of the evidence submitted. 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). For this additional reason, the petition will not be approved.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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ORDER: The appeal is dismissed.