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Office: CALIFORNIA SERVICE CENTER

Date: SEP 14 2005

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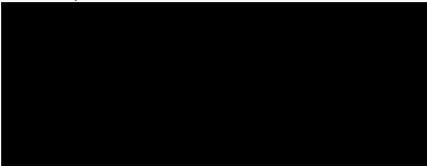
Petitioner:



Beneficiary:

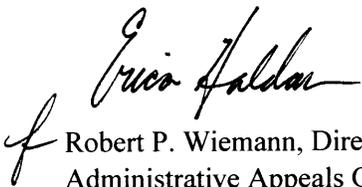
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 April 2002. It is a clothing manufacturer. Its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, indicate it is a subcontractor specializing in embroidery. 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 entity.

On appeal, counsel for the petitioner contends that the director's decision was based on an erroneous interpretation of the regulations and governing precedent decisions.

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.

On the Form I-140 petition, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary would "direct corporate management." In an undated, unsigned letter titled Exhibit "B" Qualifications of the Alien For the Job Offer of President, the beneficiary's qualifications for the proposed position were listed as his present classification as an L-1A intracompany transferee and his management experience as general manager for the foreign entity.

On July 12, 2004, the director requested: (1) a more detailed description of the beneficiary's duties in the United States including a "typical day" description; (2) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (3) the petitioner's California Forms DE-6, Quarterly Wage Report, for the second, third, and fourth quarter of 2003 and the first quarter of 2004.

In a September 29, 2004 response, counsel for the petitioner attached a list of the beneficiary's duties on a sheet of paper with no letterhead¹ indicating the beneficiary's responsibilities as:

1. General Management
 - a. Manage and oversee the production of all materials of the company and supervise the personnel pursuant to the production goals of the company.
 - b. Oversee sales to buyers and wholesale companies in the U.S.
2. Manage all U.S. Sales
 - a. Oversee sales to local buyers and store owners
 - b. Manage and oversee sales to wholesalers
3. Production Control
 - a. Oversee orders and manage production schedules with vendors
 - b. Oversee quality control for contractors and subcontractors.
4. Design Selections
 - a. Manage the design of current and next season's product lines
 - b. Oversee the purchase of fabrics, textiles and other materials
5. Market Research
 - a. Manage the research for new product trends and emerging markets
 - b. Determine the viability of new products

Counsel also attached a description of the beneficiary's "typical day" as including:

¹ The AAO observes that counsel for this petitioner has submitted a nearly identical job description for another petitioner and its prospective beneficiary. The AAO finds that submitting generic job descriptions to describe the duties of proposed beneficiaries for different companies serves only to emphasize the petitioner's failure to articulate a beneficiary's actual duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

8:30 AM	Teleconference with buyers to discuss orders and production schedules
9:00 AM	Teleconference with wholesaler to confirm orders received and to discuss quality control issues
10:00 AM	Meeting with vendors to place orders and to determine production schedules
11:00 AM	Meeting with designers to check development of new samples
12:00 AM	Lunch
1:00 PM	Meeting with operators to discuss quality control issues
3:00 PM	Supervising and management of merchandise distribution to wholesalers and retail stores
5:00 PM	Review of current production schedules and shipping deadlines for upcoming production runs

The petitioner also submitted its organizational chart showing the beneficiary as president, a production manager subordinate to the beneficiary's position, and five individuals employed in "production and operations." The petitioner did not submit job descriptions for those employees subordinate to the beneficiary and did not submit any of its California Forms DE-6.

On October 25, 2004, the director sent a second request for further evidence requesting the prospective employer's job offer on its own letterhead as well as the petitioner's second and third quarter 2003 California Forms DE-6, Quarterly Wage Report, listing all employees.

In response to the director's request for further evidence the petitioner provided an undated job offer on its own letterhead listing the beneficiary's duties as:

1. General Management
 - a. Manage and oversee the production of all materials of the company and supervise the personnel pursuant to the production goals of the company.
 - b. Oversee sales to buyers and wholesale companies in the U.S.
2. Manage all U.S. Sales
 - a. Oversee sales to local buyers and store owners
 - b. Manage and oversee sales to wholesalers
3. Production Control
 - a. Oversee orders and manage production schedules with vendors
 - b. Oversee quality control for contractors and subcontractors.
4. Design Selections
 - a. Manage the design of current and next season's product lines
 - b. Oversee the purchase of fabrics, textiles and other materials
5. Market Research
 - a. Manage the research for new product trends and emerging markets
 - b. Determine the viability of new products

The petitioner also provided its California Form DE-6 for the second quarter of 2003, the quarter in which the petition was filed. The California Form DE-6 shows the petitioner employed nine individuals in the third

month of the quarter. The California Form DE-6 does not include the beneficiary or the individual listed as the petitioner's production manager. The California Form DE-6 includes only one of the individuals listed as "production and operations" employees on the petitioner's organizational chart.

On December 27, 2004, the director determined that: (1) the description of the beneficiary's job duties failed to demonstrate what the beneficiary did on a day-to-day basis; (2) the description of the beneficiary's job duties was more indicative of an employee performing the necessary tasks to provide a service or to produce a product; (3) the record indicated that the petitioner employed only three full-time employees; (4) the record did not establish that the beneficiary's subordinate staff would be composed of supervisory, professional, or managerial employees; and (5) the beneficiary would be primarily supervising a staff of non-professional employees, thus could not be deemed to be acting in a managerial capacity. The director also noted that the petitioner had not shown that the beneficiary manages or directs the management of a department, subdivision, function, or component of the petitioner; but rather, would be involved in the routine operational activities of the entity rather than in the management of a function of the business. The director denied the petition concluding that the record did not establish that the beneficiary had been or would be employed in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) disqualified the beneficiary based on its misinterpretation of the provisions of 8 C.F.R. § 204.5(j)(4)(ii) and the precedent decision in *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Counsel asserts that CIS's interpretation contradicts the regulations relating to a beneficiary's eligibility based on managing an essential function because the decision would require a showing that some other supervised employee(s), and not the beneficiary, directly perform(s) the function. Counsel also asserts that the director disregarded the petitioner's stage of development that clearly supports the managerial nature of the beneficiary's decision-making role in facilitating the ongoing growth and viability of the petitioner.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In this matter, the petitioner does not specify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner's initial iteration of the beneficiary's duties did not explain the beneficiary's actual role within the organization. Counsel's second generic description of the beneficiary's duties did not convey an understanding of the beneficiary's duties. 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). The petitioner's description of the beneficiary's typical daily duties does provide an overview of the beneficiary's actual duties; however, the description clearly showed an individual involved in the routine activities of a subcontractor producing products for wholesale. The

beneficiary's discussion of orders, production schedules, shipping deadlines, and quality control issues; meeting with vendors and designers; and supervision of the individuals operating the embroidery machines, are not duties that are typically managerial or executive as defined by the statute. 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).

Counsel seems to implicitly object to the director's reliance on *Matter of Church Scientology Int'l.*, 19 I&N Dec. at 593. However, the *Matter of Church Scientology Int'l.* decision remains a valid precedent decision that is binding on all CIS officers in the enforcement of the Act. See 8 C.F.R. § 103.3(c). Specifically, in *Matter of Church Scientology*, the AAO examined the claimed managerial capacity of a member of the Church of Scientology. After citing to the regulations and noting that the beneficiary's duties must be "primarily at the managerial or executive level," the AAO stated: "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 Int'l.*, 19 I&N Dec. at 604. The AAO continued to examine the specific job duties and concluded that the beneficiary appeared to function as a staff officer or specialist and not as a manager or executive.

Counsel's contention that the director's interpretation of managerial capacity does not allow for the alternative basis of managing an essential function is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The addition of the concept of a "function manager" by the Immigration Act of 1990 (IMMACT 90) simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish managerial capacity. However, as in *Matter of Church Scientology Int'l.*, the statutory requirement that a beneficiary "primarily" perform in a managerial or executive capacity continues to be a valid precedent. Moreover, federal courts continue to give deference to CIS's interpretation of IMMACT 90 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at *5 (9th Cir. 1995 (unpublished))(citing to *Matter of Church Scientology Int'l.* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Moreover, neither counsel nor the petitioner clearly describes the beneficiary's duties as duties consisting of the management of a function. If asserting that a beneficiary is a function manager, the petitioner should at least identify the function with specificity, articulate the essential nature of the function, and demonstrate that the beneficiary's duty is to primarily manage the function, and not to perform the tasks associated with the function. In this matter, the petitioner's description of the beneficiary's actual duties suggests that he is the individual performing the daily tasks, including first-line supervisory duties, associated with operating an

embroidery service. Neither counsel nor the petitioner has provided sufficient evidence of other employees who would relieve the beneficiary from performing primarily these non-qualifying 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)).

Counsel's assertion that the director disregarded the petitioner's stage of development is also not persuasive. Although a company's size alone 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, 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). In this matter, the petitioner has not provided evidence that the beneficiary will be relieved from primarily performing the petitioner's first-line supervisory duties of individuals who operate embroidery machines. Again, 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.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Moreover, to establish that the reasonable needs of the organization at its stage of development 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 established the basic eligibility requirement in this matter, that the beneficiary is primarily performing managerial or executive duties. Again, 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.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the United States petitioner comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity for the foreign entity prior to entering the United States. The petitioner has provided the foreign entity's March 14, 2002 letter that confirms that the beneficiary "as General Manager, from November, [sic] 1999 to present, devoting all of his time to managerial responsibilities [sic]." The record does not contain a further description of the beneficiary's duties for the foreign entity. As the director did not request further evidence on this issue, the AAO notes this deficiency for the record and will not discuss it further.

In addition, the record does not contain evidence that the petitioner has the ability to pay the beneficiary the proffered annual wage of \$45,600. As the director noted, the record does not show that the petitioner has paid the beneficiary in the past. The petitioner's 2003 IRS Form 1120, shows that the petitioner's net income in

2003 was \$10,042 and that the petitioner had net current assets of approximately \$22,600. The petitioner could not pay a proffered wage of \$45,600 per year out of this net income or net assets. Again, as the director did not request further evidence on this issue, the AAO notes this deficiency for the record and will not discuss it further.

Further, the petitioner has not established that it conducted business for one year prior to filing the petition in June 2003. Although the company was organized in April 2002, the regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires that the petitioner provide evidence that it has been conducting business for one year prior to filing the petition. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." In this matter the petitioner has not provided evidence that it began conducting business on a regular, continuous, and systematic basis prior to late July and early August 2002. Again, as the director did not request further evidence on this issue, the AAO notes this deficiency for the record and will not discuss it further.

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.

ORDER: The appeal is dismissed.