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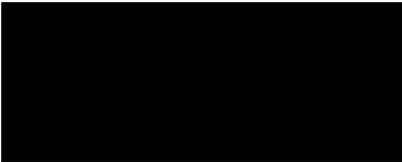
Office: VERMONT SERVICE CENTER

Date: SEP 16 2005

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

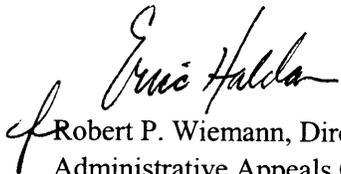
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Vermont 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 The director's decision will be withdrawn and the matter will be remanded for further consideration in accordance with this decision.

The petitioner claims to be an organization established in the State of New York in 2001. It repairs, remodels, mends, and cleans rugs and carpets. It seeks to employ the beneficiary as its general manager. 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 denied the petition, without requesting further evidence, determining that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity for the United States or foreign entities.

On appeal, counsel for the petitioner asserts that the director misquoted pertinent regulations, failed to properly apply the pertinent regulations, misstated the facts of the matter, and erroneously determined that the beneficiary had not been and would not be employed in a managerial or executive capacity. Counsel also complains that the director did not request further evidence in this matter despite having approved two nonimmigrant L-1A intracompany transferee petitions based on the same facts.

Counsel submits a brief asserting that current rules and regulations do not require that the beneficiary's subordinate employees hold only managerial positions to establish eligibility for this visa classification; but that the current rules and regulations contemplate a beneficiary's subordinates' in supervisory or professional positions or that the beneficiary manage an essential function as viable alternatives to establish eligibility for this visa classification. Counsel contends that the beneficiary's duties for the foreign and United States entities involve responsibilities that are primarily managerial or executive. Counsel provides excerpts from the U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2004-2005 Edition*, to support her contention.

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 AAO acknowledges that the director denied the petition without requesting further evidence to clarify whether eligibility for the benefit sought had been established and improperly cited 8 C.F.R. § 103.2(b)(12) rather than the appropriate regulation found at 8 C.F.R. § 103.2(b)(8) to support her denial. In the director's January 7, 2005 decision, the director observed that: "the record did not include sufficient documentation to clearly establish that the beneficiary's managerial experience and education qualifies him/her as an Executive/Manager;" "the record does not clearly establish that the beneficiary has been or will be performing the duties of an executive/manager;" and, "the evidence of record does not provide a comprehensive description of the beneficiary's duties sufficient to enable Citizenship and Immigration Services (CIS) to make a favorable decision on the petition." The director cited only three facts that actually pertain to this matter. The director noted that the petitioner claimed to have paid \$168,590 in salaries "to eight subordinate employees," and that "the beneficiary's title is that of General Manager." The director concluded that the total payment of \$168,590 to eight employees did not persuade that the subordinate employees held managerial positions. The remaining paragraphs in the decision include the director's presumptions (not tied to any particular fact) and conclusions that have not been adequately applied to the facts in this matter. Further, the AAO observes that the director's citation to one of the "facts," the number of the petitioner's claimed "subordinates," is inaccurate.

The regulation at 8 C.F.R § 103.2(b)(8) governs when a request for evidence is required and states in pertinent part:

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by the Service prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other 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, including blood tests.

This regulation requires that the director request additional evidence in instances, "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. In this matter, the director denied the petition because: (1) the petitioner had not provided sufficient evidence regarding the beneficiary's proposed duties, and (2) the beneficiary's "eight" subordinates could not be managers because the petitioner's payment of salaries to all of its employees was only \$168,590. Such a denial without further explanation is procedural error on the part of the director.

In some matters, the appeal process provides an adequate remedy to such procedural error. For example when the petitioner or its counsel supplement the record on appeal with documentary evidence relating to the issues raised in the director's denial. In this matter, neither counsel nor the petitioner provides documentary evidence sufficient to establish that the beneficiary's position is that of a manager or an executive for either the U.S. or foreign entity. Counsel's brief in this regard is based on her assertions and not on documentary evidence.¹ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Nor does counsel or the petitioner provide documentary evidence to support the employment of any claimed employees when the petition was filed. The record is also deficient in regard to other issues, such as the petitioner's qualifying relationship with the beneficiary's foreign employer.

The failure of the director to adequately address the deficiencies in the petitioner's description of the beneficiary's job duties, as well as those of his subordinates, coupled with the director's misstatement of a fact that directly impacted one of the director's ultimate conclusions, requires the remand of this case. The AAO finds that the director's decision was inadequate to apprise the petitioner of the deficiencies in the petition and supporting evidence and counsel, whether through lack of experience or by design, did not provide pertinent documentary evidence on appeal in an attempt to establish the beneficiary's eligibility for the visa classification. Further, for

¹ Paraphrasing job descriptions found in the *Occupational Outlook Handbook* to establish eligibility do not provide the required specificity to demonstrate why or how the beneficiary's position in this matter is managerial or executive. Counsel attempts to explain why a small company is required to have an individual in a managerial or executive position. The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee, and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. 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 record, the AAO does not find evidence of prima facie ineligibility but finds that the evidence submitted, even when considering counsel's arguments on appeal, raises questions regarding the beneficiary's eligibility for this visa classification.

For example, the only description of the beneficiary's proposed duties for the petitioner is found in the petitioner's August 27, 2004 offer of employment, and repeated in the petitioner's August 27, 2004 letter submitted in support of the petition. The petitioner states that the beneficiary's duties include:

[P]lanning, formulating, directing, managing, and coordinating activities of professional workers engaged in *expert* repair, remodeling, and mending rugs and carpets, as well as overseeing supervisory personnel and other workers engaged in cleaning rugs and carpets, and warehouse management; planning, developing, formulating and managing advertising, marketing, and promotion of our services to develop new markets, increase share of market, and obtain competitive position in industry; allocate operating budget and approve and supplies and equipment requisition; outline work plan and assign tasks, duties, responsibilities, and scope of authority; review quality of work for conformity to overall company's standards; adjust customers' complaints; screen and hire job applicants, and recommend promotions, transfers or dismissals.

Contrary to counsel's assertions, the description provided is not comprehensive. The petitioner alludes to the beneficiary's supervisory duties over "supervisory personnel and other workers" and "warehouse management." However, as counsel points out the petitioner claims to employ a total of eight employees. Although counsel claims on appeal that two of the beneficiary's seven subordinates include a "warehouse manager" and a "rug cleaning supervisor," the record does not provide job descriptions for these employees that establish these two individuals primarily perform supervisory or managerial duties.

Further, counsel's contention that the beneficiary manages the overall activities, thus manages or directs the management of a function does not aid in establishing an understanding of the beneficiary's actual daily duties. 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 actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Moreover, counsel's claim that the beneficiary's responsibility for "planning, developing, formulating and managing advertising, marketing, and promotion of [the petitioner's] services to develop new markets, increase share of market, and obtain competitive position in industry" constitutes the management of an essential function, is not persuasive. This description is more indicative of an individual who is duties are involved in the routine operational tasks associated with advertising, marketing, and promoting the petitioner's services. 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).

Finally, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's

duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. This failure of documentation is important because the record suggests that the beneficiary's responsibilities also include duties, such as first-line supervisory duties of non-professional employees and marketing and promotion duties, tasks that are not traditionally managerial or executive duties as defined in the statute. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Regarding the beneficiary's duties for the foreign entity, the petitioner has likewise failed to provide documentary evidence establishing that the beneficiary's duties were primarily managerial or executive. Although the petitioner claims that the beneficiary, as project manager, had key senior managerial/executive responsibilities including planning, directing, overseeing, and coordinating activities through subordinates, the petitioner failed to provide an organizational chart, evidence of the number of employees the foreign entity actually employed, or descriptions of those subordinates' 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 reliance on past approvals of the beneficiary's eligibility as a nonimmigrant manager or executive is misplaced. It must be noted that many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1A 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 at 22; *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. at 1103. 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 petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Finally, as alluded to above, the AAO cannot determine based on the evidence in the record whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. This additional element of eligibility also requires further examination.

As the initial record in this matter did not provide evidence of ineligibility and as the director did not provide an opportunity to address the deficiencies in the record prior to his decision and the director failed to provide sufficient notice to the petitioner regarding the deficiencies in the record so that the deficiencies could be addressed on appeal, the matter will be remanded to the director for the purpose of a new decision. The director shall request further evidence on the issues raised above and any other issues that come to his attention and after consideration of any new evidence submitted, render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

ORDER: The director's decision of January 7, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.