

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B4

FILE: [Redacted]
WAC 03 050 53577

Office: CALIFORNIA 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, 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 1996. It trades in textiles and garments. 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 managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the director's decision is in error.

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 petitioner has established that the beneficiary will be employed in an executive capacity for the United States entity. The petitioner does not assert that the beneficiary will be employed in a managerial capacity.

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 November 28, 2002 letter appended to the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated:

As the President of Sunmore USA, [the beneficiary] is responsible for setting up corporate policies, directing contract negotiations and other business activities, overseeing the formulation of financial programs in search of new or continuing operations, and supervising the preparation of sales promotions to develop new markets. Furthermore, she is also responsible for the hiring and firing of personnel, general supervision of personnel in the U.S. office and coordinating business decisions with Sunmore China. [The beneficiary] enjoys great autonomy and reports to Sunmore China when necessary. She also exercises wide latitude and discretionary decision-making power in establishing the most advantageous course of action for the successful management and direction of Sunmore's international development activities. She has been critical to Sunmore USA and to the business scheme of Sunmore China.

The petitioner also submitted a copy of its organizational chart showing the beneficiary as president and a general manager reporting directly to her. The chart also identified individuals in the positions of sales agent, purchasing agent, and office clerk, all reporting to the general manager.

On February 18, 2003, the director requested: (1) a more detailed description of the beneficiary's duties in the United States including the approximate percentage of time the beneficiary spent in each listed duty; (2) the petitioner's organizational chart describing its managerial hierarchy and staffing levels as of the date the petition was filed; (3) a brief description of job duties, educational levels, dates of employment and annual

salary for each employee under the beneficiary's supervision; and (4) the source of remuneration of all employees.

In a May 12, 2003 response, the petitioner provided an expanded list of the beneficiary's duties and the percentage of time she spent on her duties. The petitioner indicated that the beneficiary spent 30 percent of her time on executive duties and policies which included meeting with the board of directors and officers of the foreign entity and the petitioner, executing decisions required by the foreign entity's board of directors, guiding the petitioner's policies, business activities and goals, and ensuring cooperation between the policies and goals of the petitioner and the foreign entity. The petitioner indicated the beneficiary spent 35 percent of her time making final determinations on business transactions, overseeing financial matters, setting goals and directions for the promotion of products and materials to be traded, formulating strategic policies, directing the petitioner in regards to international business activities, trade, and goals for research in different target markets, promoting standardization of customer service and relations, searching for venture capital candidates, and considering suggestions for equipment upkeep and improvement, and buying new equipment. Finally, the petitioner noted that the beneficiary spent 35 percent of her time supervising managerial employees, directing and assigning the scope of employment for managerial employees, coordinating communication among senior managerial employees in the foreign entity and the petitioner, setting guidelines for managerial employees' behavior, presiding over meetings with the foreign entity and petitioner's managerial employees, and reserving the right to hire and dismiss all managerial level employees and subordinates.

In addition, the petitioner provided descriptions of the duties of the petitioner's general manager, sales agent, purchasing agent, and office clerk. The petitioner's description of the general manager's duties contained elements similar to the beneficiary's duties such as communicating and meeting with the foreign entity's managerial employees, handling and overseeing the standardization of customer service, ensuring employees followed company policy, assigning tasks and determining scope of employees' employment, hiring and dismissing employees, supervising the execution of business deals, overseeing international and domestic sales, supervising the promotion and advertisement of products and materials to be traded, supervising customer service, and advising the president on venture capital candidates and on new technologies. The description of the general manager's duties also included supervisory components not listed in the beneficiary's job description such as supervising the execution of orders of textiles, maintaining order, managing day-to-day activities of the company and subordinate staff, overseeing sales, maintaining market analysis reports, and approving the purchasing agent's reports.

The petitioner's sales agent's duties included researching and analyzing the U.S. market, maintaining client contact, researching and producing reports on product prices and quality, engaging in the advertisement of products to be sold, and attending tradeshows and information exchange meetings. The sales agent's duties also included assisting in the search for venture capitalists, assisting the purchasing agent, assisting with the customer service support system, and searching for technological improvements for equipment used by the company.

The purchasing agent's duties included receiving production packages from clients, reviewing production and shipping details, submitting and confirming costs and receipts from manufacturers, providing all shipping

details, confirming details with clients, tracking documents, submitting documents to customs brokers, notifying clients of the progress of their orders, assisting the sales agent in advertising products to be traded, assisting with the customer service support system, and attending trade shows and information exchange meetings.

The office clerk's duties included assisting with purchasing products and materials, quality control, market research, keeping books and records, making and verifying invoices, processing accounts receivable, collecting payments, handling bills, making travel arrangements, performing secretarial duties, providing general support for the sales agent, purchasing agent, and general manager, receiving visitors, ordering office supplies, managing files and documents for each client, and taking information and receiving complaints from each client.

The director determined that the beneficiary's job description and those of her subordinates did not establish that the beneficiary would be employed in a managerial or executive position. The director also considered the petitioner's type of business and its organizational structure, and found it unreasonable to have an executive managing four non-professional, non-managerial employees on a day-to-day basis. The director determined that all the petitioner's employees are responsible for performing the day-to-day tasks of the business rather than performing the duties of a manager. The director also determined that the positions held by the beneficiary's subordinates were not professional positions. Finally, the director determined that the beneficiary was not a functional manager.

On appeal, counsel for the petitioner asserts that the beneficiary qualifies as an executive under the two-prong test set forth in *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Counsel contends that the expanded description of the beneficiary's duties shows that the beneficiary has substantial authority over the generalized policy of the company and that her responsibilities are at the executive level. Counsel also observes that the petitioner has provided descriptions of the beneficiary's subordinates' duties and that her subordinates perform the necessary tasks to produce the petitioner's product and provide its services.

Counsel also asserts that Citizenship and Immigration Services (CIS) has already concluded that the beneficiary is an executive or manager because the beneficiary has been in L-1A intracompany transferee status for seven years as a manager and executive. Counsel contends that CIS has placed undue emphasis on the number of employees under the beneficiary's direction. Counsel cites a district court decision holding that denial of a petition on such grounds was untenable. Counsel further asserts that the petitioner's general manager is the first-line supervisor who, along with the petitioner's three other employees, performs the petitioner's non-qualifying duties.

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). The further detail provided by the petitioner regarding the beneficiary's job duties, and those of her subordinates contain overlapping detail. The petitioner has not adequately delineated the duties amongst the petitioner's employees. 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). Moreover, 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 does 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.

It is not sufficient to delineate the duties of various employees and then state that the beneficiary oversees these very same duties, rather the petitioner must provide a clear understanding of the tasks the beneficiary performs on a daily basis. Placing language with managerial connotations, such as oversee, supervise, make final determinations, or set the guidelines in front of duties ascribed to lower-level employees does not convey a comprehensive understanding of the beneficiary's actual duties within the organization. It appears at most an attempt to elevate the beneficiary's place in the organizational hierarchy without delineating the beneficiary's actual daily tasks.

Although counsel contends that CIS has placed undue emphasis on the number of employees under the beneficiary's direction, the AAO notes 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.* The record in this matter does not contain obvious discrepancies, but the petitioner's submission of similarly described duties for the president and the general manager leads the AAO to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, the AAO observes that counsel's reliance on past approvals is not persuasive. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Likewise, the AAO will give due consideration to the underlying reasoning employed in a district judge's decision when it is properly before the AAO, however, counsel should note that the analysis does not have to be followed as a matter of law. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

Although the petitioner in this matter has provided additional detail regarding the beneficiary's duties and the duties of her subordinates, the AAO finds upon review of the totality of the record, the petitioner has not established that the beneficiary performs in a primarily executive capacity.

Beyond the decision of the director, the petitioner has provided documentary evidence that raises questions relating to the legitimacy of the qualifying relationship between the petitioner and 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 subsidiary of the beneficiary's foreign employer.

The director requested that the petitioner provide evidence that the foreign entity in this matter had actually purchased its interest in the petitioner. The regulations specifically allow the director to request additional evidence in appropriate cases. See 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. The director specifically requested that the petitioner explain the source and reason for receiving funds not originating with the beneficiary's foreign employer.

The petitioner provided a September 27, 1997 customer receipt showing that Golden Unicorn Industrial Ltd. had remitted \$110,000 to the petitioner. The petitioner also provided a copy of its bank statement for the month ending September 30, 1997 showing the receipt of \$109,977.50 from Golden Unicorn Industrial Ltd. on September 29, 1997. Despite the director's request, the petitioner did not explain why a third unrelated party provided the funds ostensibly to purchase an interest in the petitioner. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, the same bank statement also shows that on September 30, 1997 the petitioner transferred \$90,000 out of its account by international wire. The AAO questions why upon receipt of the funds, the petitioner transferred the majority of the funds out of its account to an unknown beneficiary overseas. The evidence in the record does not establish that the petitioner and the beneficiary's foreign employer enjoy a qualifying relationship as defined in pertinent part in the regulation at 8 C.F.R. § 204.5(j)(2). 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.

ORDER: The appeal is dismissed.