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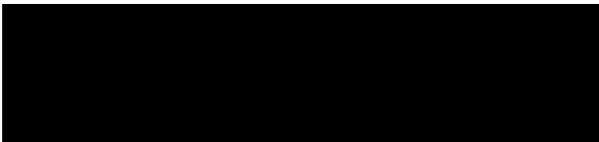


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: SEP 28 2005
SRC 03 200 51753

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, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition seeking 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 Texas that is engaged in the wholesale and retail sale of furniture manufactured by the foreign entity. The petitioner seeks to employ the beneficiary as its vice-president.

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 states that the beneficiary's "prospective position" as vice-president is in a primarily managerial or executive capacity. Counsel claims that the director "incorrectly determined the prospective duties of the beneficiary based on the petitioner's past staffing levels. Counsel contends that the director should have also considered the size of the petitioner's business and its operational structure when determining employment in a qualifying capacity. Counsel submits an appellate brief in support of the assertions on appeal.

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 issue in this proceeding is 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 employment-based petition on July 15, 2003, on which it noted that the beneficiary would be employed as its vice-president at an annual salary of approximately \$30,000. In an attached letter, dated July 10, 2003, the petitioner stated that as the vice-president, the beneficiary would possess the following job responsibilities:

- (1). In charge of overall policy making, business strategies designing, and corporate goals formulating;
- (2). Supervise the implementation of the personnel and administrative procedures of the corporation;
- (3). Determine marketing strategies; negotiate major transactions;
- (4). Hire and fire managerial and professional employees and supervise their work;
- (5). Represent the company and exercise discretionary power over other day-to-day operations;
- (6). Report the business operation to the President; and,
- (7). Other duties that [are] appropriate with the responsibilities as vice president.

The petitioner stated that while the beneficiary "may also participate in many daily detailed operations," the majority of her time would be spent working in a managerial or executive capacity.

The petitioner submitted an organizational chart of the company identifying the beneficiary's position as vice-president and the following four subordinate positions: warehouse manager and internal bookkeeper, corporate secretary and manager, warehouse coordinator, and sales representative. The AAO notes that of the four lower-level positions, the petitioner provided only the name of the employee performing in the position of "corporate secretary and manager." While the petitioner submitted several of its previously filed Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, it did not submit the quarterly return for the period ending June 2003, the period closest to the date of the filing of the instant petition.¹

The director issued a request for evidence on January 6, 2004, asking that the petitioner submit a "definitive statement" describing the beneficiary's proposed job duties, including: (1) the beneficiary's beginning date of employment with the United States company; (2) a list of the beneficiary's job duties; (3) the percentage of time the beneficiary would spend on each job duty; (4) the number of employees subordinate to the beneficiary, specifically noting whether each occupies a managerial or supervisory position; (5) a brief description of the job duties performed by the beneficiary's lower-level employees; and (6) the qualifications for each position.

The petitioner responded in a letter dated March 2, 2004, stating that from August 2001 through December 2002 the beneficiary has worked for the petitioning entity in the position of vice-president. The petitioner provided a list of job duties that the beneficiary would perform in this capacity, which was essentially the same as those outlined above. The petitioner noted that the beneficiary would also assist in performing the managerial duties associated with "big transaction[s]." The petitioner assigned percentages to each job duty as the amount of time the beneficiary would spend dedicate to each. The petitioner stated that the beneficiary is qualified for the proposed position, as she "possesses the know-how of the business management and many years of experience as top level manager at the parent company, which are critical to the operation of the U.S. entity."

¹ The AAO notes that the beneficiary was not listed as an employee of the petitioning entity on the quarterly tax return for the period ending on March 31, 2003.

With regard to the beneficiary's subordinate staff, the petitioner stated that the business development manager-corporate secretary and warehouse manager would report directly to the beneficiary. The petitioner provided a brief description of the job responsibilities held by the two lower-level managers. The AAO notes ambiguity in the positions filled at the time of filing the petition. As the petitioner's organizational chart identifies four positions but only one employee by name, the positions reflected on the organizational chart cannot be compared with those on the petitioner's quarterly tax return to determine which were filled at the time of filing the petition.

In a decision dated May 14, 2004, the director concluded that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Noting the low amount of wages identified by the petitioner on its quarterly tax return, the director concluded that the majority of the petitioner's employees were employed on a part-time basis. The director stated that as a result of the lack of full-time employees, the beneficiary would likely perform some of the day-to-day functions of the petitioner's business. The director noted that of the two managerial positions subordinate to the beneficiary, a high school graduate occupied one, while the second had not yet been filled. The director stated "[t]his is an indication that the beneficiary is currently not performing duties in the position of Managerial [sic] or Executive because there is no full staff." The director further stated:

The beneficiary evidently exercises discretion over the day-to-day operations of the activity, but it must be noted that he is also performing some of the day to day duties of the business. It is reasonable to assume that this business does not need a fulltime executive to manage to make decisions regarding the company.

The director concluded that the beneficiary's "primary assignment" would not be directing the management of the organization or supervising a subordinate staff of professional, managerial or supervisory personnel who would relieve her from performing the non-qualifying functions of the petitioner's business. Consequently, the director denied the petition.

In an appeal filed on June 14, 2004, counsel claims that the beneficiary's "prospective position" would be in a qualifying managerial or executive capacity. Counsel states that the director incorrectly based her denial of the petition on the petitioner's previous staffing levels rather than also considering the size and structure of the petitioner's business. In his appellate brief, counsel states that as a "relatively new company," which has experienced fluctuations in its staff, the director should have considered the "totality of the situation," including the petitioner's stage of development, increasing growth in business and the size of its two business facilities. Counsel states:

With the operations of those two substantive business premises, it is logical to conclude that the petitioned prospective personnel of Vice President will supervise at least a few managerial level personnel, and will perform primarily executive and managerial duties as top executive officer of the Company (the President of the company is stationed in China parent company).

Counsel references the petitioner's organizational chart as "very reasonable," and states that the petitioner's "temporary short staffing situation" cannot be the sole factor in denying the immigrant petition. Counsel acknowledges the part-time status of its workers, but notes that the petitioner has been "cautious and responsible" in its hiring. Counsel states that despite the limited staff, the petitioner's business and corporate structure have grown. Counsel contends that in reviewing the beneficiary's "prospective position," Citizenship and Immigration

Services (CIS) should examine all related factors, rather than basing its decision solely on the size of the petitioner's staff.

Upon review, the petitioner has not demonstrated that the United States entity would employ the beneficiary in a primarily managerial or executive capacity. 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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Here, the petitioner does not clarify 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 petitioner cannot claim that some of the duties of the position entail executive responsibilities, while others are managerial. In other words, the petitioner may not claim to employ the beneficiary 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 has not satisfied this essential element.

The petitioner's vague and nonspecific description of the beneficiary's job duties fails to demonstrate what the beneficiary would do on a day-to-day basis. For example, the petitioner stated that the beneficiary would "represent the company," devise the petitioner's business and marketing strategies, supervise its personnel and administrative procedures, and negotiate and assist in "major transactions." The petitioner, however, does not explain in what type of situation the beneficiary would represent the petitioner or identify in which transactions the beneficiary would assist. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO notes that although the director requested a "definitive statement" of the beneficiary's job duties, counsel submitted the same nondescript outline as that previously provided by the petitioner. The 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).

In addition, rather than specifically describing the beneficiary's job duties, the petitioner generally paraphrased the statutory definitions of "managerial capacity" and "executive capacity." *See* sections 101(a)(44)(A) and (B) of the Act. For instance, the petitioner stated that the beneficiary would formulate the petitioner's policies and goals, "[h]ire and fire managerial and professional employees," supervise the work of the managerial and professional employees, exercise discretion over the company's day-to-day operations, and report to the president of the organization. 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 notes on appeal 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.*

At the time of filing, the petitioner was a four-year-old import and export company. As noted previously, other than the position of corporate secretary and manager, it is unclear which positions identified on the petitioner's organizational chart were filled at the time of filing the petition. The petitioner's March 2, 2004 letter does not clarify the petitioner's staff. Based on the petitioner's organizational chart, at the time of filing the petition the petitioner employed a corporate secretary-manager and three other employees. The petitioner did not submit evidence either in its March 2, 2004 response or on appeal that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. In fact, counsel admits to the petitioner's "temporary short staffing situation" and the employment of part-time workers on appeal. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as vice president, a corporate secretary-manager and three additional workers whose roles are undefined by the petitioner. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel repeatedly stresses on appeal the beneficiary's "prospective" position as the petitioner's vice-president, stating that the "[p]etitioner's business size and existing operational structure guarantee the Beneficiary's *prospective* position at executive and managerial capacity." (emphasis in original). Counsel also references the petitioner as "a new start up business." Despite the fact that the petitioning entity has been operating in the United States for four years, it appears that counsel is maintaining that following the establishment of the petitioning entity the beneficiary will occupy a primarily managerial or executive position. Unlike an L-1A nonimmigrant visa petition, the regulations governing this immigrant visa classification do not allow for the beneficiary to develop into a manager or executive after the organization has had an opportunity to establish itself in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C) (allowing one year from the date of approval of the nonimmigrant petition for a new United States office to support the beneficiary in a primarily managerial or executive capacity). In order to meet the eligibility requirements for an immigrant visa, the petitioner must establish that the beneficiary would be employed in a qualifying capacity at the time of filing the petition. *See* 8 C.F.R. § 204.5(j)(5). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity as required section 203(b)(1)(C) of the Act. The petitioner stated in its July 10, 2003 letter that the beneficiary was employed overseas as the company's "vice general manager." The petitioner provided a nonspecific outline of six job responsibilities held by the beneficiary in her capacity as vice general manager. The petitioner's nondescript claims that the beneficiary formed business plans and policies, "supervise[d] managerial level personnel," "[made] decisions in daily operations," and oversaw the company's international marketing and business development planning functions, as well as its financial department do not identify the actual daily job duties performed by the beneficiary. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Additionally, the beneficiary's responsibilities of hiring and firing and forming corporate policies essentially restate portions of the statutory definitions of managerial capacity and executive capacity. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.* As a result, the AAO cannot conclude that the beneficiary was employed abroad in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

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.