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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B4

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 0 8 2006
WAC 05 207 52604

IN RE: Petitioner:
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:

[redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based visa 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 visa petition 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 California that is engaged in the import and sale of porcelain products and home furniture. The petitioner seeks to employ the beneficiary as its president and general manager.

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 for the petitioner contends that the director erred in concluding that the beneficiary's job duties would not be primarily managerial or executive in nature. Counsel challenges the director's findings that the job description offered by the petitioner is vague, and that the record demonstrates that the beneficiary would primarily perform non-qualifying tasks related to the petitioner's business functions. Counsel submits a brief in support of the 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.

The issue in the instant matter 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 visa petition on July 13, 2005 noting the beneficiary's proposed employment as president and general manager of the seven-person United States company. In an attached letter, dated June 17, 2005, the petitioner noted the beneficiary's employment in "dual roles" as both an executive and a manager, and outlined the following job duties associated with the position of president:

1. Plans and directs all aspects of [the] organization's business development, sales and marketing, accounting and financial policies, planning, objectives, and initiatives;

2. Establishes internal policies, including but not limited to, reward and punishment policies, performance evaluation standards, employee benefits, etc.;

3. Determines the budgetary and personnel needs to achieve objectives;

4. Be responsible for developing new market initiatives, assessing new markets, and analyzing business opportunities;

5. Represents the company's interest in dealing with government agencies, customers, employees, business service providers, etc.;

6. Consults with CPA and legal counsel to familiarize with federal, state, and local government policies governing business practice in the U.S., including but not limited to, business registration, tax reporting, labor relations, etc.;

7. Liaises with the parent company and the productions facilities to coordinate the U.S. operation with that of the parent company and the production facilities;

8. Reports to the parent company regarding U.S. subsidiary's business progress, financial situation, and new market trends in the U.S., and seeks financial support from the parent company to fund the expansion program;

The petitioner noted that as the company's general manager, the beneficiary would perform the following managerial job duties:

1. Implements financial programs and hiring plans to support business and employee needs;

2. Establishes responsibilities and procedures of essential functions, and directs and coordinates overall operation through subordinate managers or supervisors;

3. Provides training to subordinates and specifies job assignments;

4. Supervises and controls the work of the sales manager, warehouse manager, and office manager;

5. Exercises total control over financial issues such as budget control, funding, fund allocation, cash flow, extension of credit, and personnel actions such as hiring and firing, promotion, leave authorization;

6. Implements reward and punishment policies based on performance evaluation;

7. Reviews sales reports to determine business progress and takes necessary actions to obtain business objectives;

8. Listens to reports from subordinates managers or supervisors regarding issues arising from day-to-day operation and gives instructions as to how to deal with the problems.

The petitioner stated that the beneficiary would supervise a sales manager, warehouse manager, and office manager, who would "submit budgetary request[s] for [the] [p]resident's approval, supervise and manage the company's import, sales, marketing, shipping, and accounting operations, and prepares [sic] operations reports for [the] [p]resident's review."

In an appended organizational chart of the United States company, the beneficiary was depicted as supervising the company's six employees that consisted of a porcelain division sales manager, a home furniture division sales manager, an office manager, a warehouse manager, an administrative-import assistant, and a warehouse worker. The petitioner noted its use of two outside sales representatives, as well as two stores within which it purportedly sold its porcelain products and furnishings. The petitioner also attached a list of its seven employees, briefly noting the job responsibilities held by each.

The petitioner also submitted its employee records for the months of April through June 2005, and state and federal quarterly wage reports for the period ending June 30, 2005.

The director issued a request for evidence on December 16, 2005 directing the petitioner to submit the following documentary evidence of the beneficiary's employment in a primarily managerial or executive capacity: (1) an organizational chart describing the job duties and educational levels of all employees supervised by the beneficiary and how the workers are compensated; (2) a "detailed description" of the job duties performed by the beneficiary, as well as a description of the beneficiary's "typical day"; and (3) certified state quarterly wage reports filed by the petitioner for the third and fourth quarters in 2005.

Counsel for the petitioner responded in a letter dated March 6, 2006, noting that the petitioner employed seven full-time workers and three commissioned sales representatives. The AAO notes that according to the petitioner's attached list, each of its sales representatives, of which two are businesses, were contracted for work with the petitioning entity approximately two months after the present filing.

In his letter, counsel explained that the petitioner operated with four departments – porcelain sales, furniture sales, shipping-receiving-warehousing, and importing-administration – each of which is supervised by a manager who reports to the beneficiary. Counsel stated that under each manager are employees who perform the "routine operational duties" of the department. Counsel also noted the petitioner's use of an outside accountant to complete its monthly payroll, tax reporting, and financial statements.

Additionally, counsel provided the following outline of the beneficiary's "typical day":

9:00 – 10:00 AM
(2 hr. or 21%)

> Check all e-mail incoming from Japan headquarter, China factories, Hong Kong and Paris [b]ranches and reply [to] all e-mail. The contents of the e-mails included oversights over issues regarding product development and design, production, regional sales, etc.

10:30 – 11:30 AM
(1 hr. or 11%)

> Brief meeting with sales managers and make monthly planning[.]

11:30 AM – 1:30 PM
(2 hr. or 21%)

Lunch meeting with Mr. (CPA), discussing about accounting contracts for tax reporting, financial statements, payroll, and consulting about updated tax issues.

2:00 – 4:00 PM
(2 hr. or 21%)

After making meeting appointment with Disney Buyers on 01/18/06, called who is the Sourcing Manager for Disney and discussed about 2006 Christmas production increases.

4:00 – 4:45 PM
(45 min. or 8%)

Telephone conversation with Mr. President of Japan parent company President [sic], discussing development schedule and speed for all new projects including new pet products and Disney products 2006[.]

4:45 – 5:15 PM
(30 min. or 5%)

Telephone conversation with Mr. requesting an increase of employees from 1,000 to 1,300 due to new projects coming for 2006[.]

5:15 – 6:00 PM
(45 min. or 8%)

Check in coming and out going e-mail[.]

6:00 PM Left office[.]

8:00 – 8:30 PM
(30 min. or 5%)

Telephone conversation with [a]gent, Mr. ,] to source other vendors in China, Vietnam, and Thailand[.]

Counsel claimed that the outline of the beneficiary's "typical" job duties demonstrated that the beneficiary was "mainly concerned with and occupied with issues related to the organization's direction, supervision, development, and coordination of various aspects of the operation," and would occupy a primarily managerial or executive position within the petitioning entity.

Counsel submitted the petitioner's state quarterly wage report for the third quarter of 2005. The AAO notes that according to the amount in wages reflected on the quarterly wage report, the petitioner's office manager appears to have been employed on a part-time basis during the period this petition was filed.

The director issued a decision, dated April 11, 2006, 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. The director restated the job duties associated with the beneficiary's positions of president and general manager, and specifically noted that a portion of the job duties are not typically deemed to be managerial or executive in nature. The director concluded that the beneficiary's job duties of developing and assessing new markets, interacting with government agencies and customers, and supervising the company's three managers are more suggestive of those tasks necessary "to provide a service or to produce a product."

The director further stated that the job description presented by the petitioner was "vague and nonspecific," and failed explain what tasks the beneficiary would perform on a daily basis. The director specifically noted that the petitioner did not "define [its] goals, policies, [or] strategies, or clarify who actually performs the marketing, budgeting, finance and accounting, advertising, and personnel functions."

The director also noted that the petitioner appeared to employ only five full-time workers on the date of filing, while the remaining two were employed on a part-time basis. As mentioned previously, the AAO notes that the petitioner's September 30, 2005 state quarterly wage report suggests that the petitioner employed at least one part-time worker, its office manager, on the filing date. According to the quarterly wage report, a second worker, the manager of the porcelain department, received wages that suggest employment in a part-time status. It appears, however, that at some time during the third quarter this employee replaced the previous porcelain department manager, and therefore had only begun to receive compensation.

The director ultimately determined that the beneficiary would assist with the day-to-day non-qualifying tasks related to the petitioner's business functions and would not occupy a primarily managerial or executive position. The director further concluded that the beneficiary would not be employed as a function manager as the petitioner had not demonstrated that "the beneficiary manages or directs the management of a department, subdivision, function, or component of the petitioning organization." Consequently, the director denied the petition.

On appeal, counsel for the petitioner contends in an April 21, 2006 brief that Citizenship and Immigration Services (CIS) erred in determining that the beneficiary did not qualify for the requested immigrant visa classification. Counsel challenges the director's classification of some of the beneficiary's job duties as non-managerial and non-executive, stating that his finding was "arbitrary" and not supported by "any convincing arguments." Counsel instructs that even if a portion of the beneficiary's job duties are considered non-qualifying, the relevant statute "does not require that the beneficiary's duties in the U.S. have been or will be *exclusively* executive or managerial in nature." (Emphasis in original).

Counsel further disputes the director's finding that the description of the beneficiary's "typical day" is vague and nonspecific. Counsel contends that the director failed to discuss why the job description was insufficient to establish the beneficiary's performance of primarily managerial or executive job duties.

Counsel also claims that the petitioner sufficiently accounted for the performance of its non-qualifying functions, such as marketing, budgeting, finance, accounting, advertising, and personnel, in the job descriptions offered for its managers and lower-level employees. Counsel states that each of the petitioner's four departments has a manager who is "responsible for the management of daily operations of the department and supervision of the work of department employee(s)." Counsel contends that the petitioner's managers,

lower-level employees, and contracted sales representatives and accountant relieve the beneficiary from personally performing the daily operational tasks of the business.

Lastly, counsel contends that the director erred in deeming the beneficiary to be employed as a first-line supervisor. Counsel states that the beneficiary meets the statutory criteria of a manager, as he supervises managerial employees and exercises wide latitude in discretionary decision-making. Counsel notes that the employees subordinate to the beneficiary are either managers or first-line supervisors. Counsel contends that the beneficiary's additional "supervisory duties" such as making decisions and establishing goals for the corporation, exercising discretion over the company's operations, determining its budget and line of products, and assigning tasks demonstrate that the beneficiary would not occupy the position of first-line supervisor.

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity 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).

As mentioned by the director, the job descriptions offered by the petitioner are not sufficiently detailed so as to clarify the managerial or executive job duties performed by the beneficiary on a daily basis. Specifically, the beneficiary was identified as being responsible for "developing new market initiatives," "assessing new markets," representing the petitioner in its contacts with government agencies, customers, and business service providers, and liaising with foreign production facilities. The petitioner does not explain what specific managerial or executive job duties are associated with these job responsibilities. For example, without an explanation of the beneficiary's role in developing and assessing new markets, it is unclear whether the beneficiary is personally responsible for performing the company's marketing functions and expanding its customer base, which may reasonably be assumed from the petitioner's representations. Additionally, based on the petitioner's brief statement, it appears that the beneficiary's role in the production of the petitioner's products overseas, in which he "coordinate[s] the U.S. operation with that of the parent company and the production facilities" falls short of being managerial or executive. Again, the petitioner failed to explain how the beneficiary's responsibility as a liaison with the foreign company and production facility would incorporate primarily managerial or executive tasks.

Similarly, the petitioner did not define the managerial or executive responsibilities associated with directing the company's "objectives," "initiatives," "essential functions," "financial programs," or "overall operation." 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 [redacted]. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), [redacted].

The outline of the beneficiary's "typical day" supports the suggestion that the beneficiary would be personally responsible for performing several of the petitioner's non-qualifying day-to-day functions. Based on the beneficiary's "typical" daily tasks, the beneficiary is responsible for addressing issues related to the development, design and production of the petitioner's products, as well as determining production levels and staffing of the foreign facilities, and locating overseas vendors. Cumulatively, these non-managerial and non-executive responsibilities occupy sixty percent of the beneficiary's time. Moreover, copies of the petitioner's

invoices and bills of lading, one of which bears a date subsequent to the present filing, reference the beneficiary as the contact for the petitioning entity, thereby suggesting that the beneficiary is personally selling the petitioner's products. Contrary to counsel's claim on appeal, the beneficiary's job duties do not appear to be primarily managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO notes that the petitioner has not identified any subordinate workers who would relieve the beneficiary from performing these tasks. Nor has the petitioner documented why these responsibilities should be considered managerial or executive in nature. *See* §§ 101(a)(44)(A) and (B) of the Act. 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)).

Moreover, it does not appear that the petitioner employs a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

Here, at the time of filing, the petitioner employed the beneficiary as its president-general manager, two sales managers, a warehouse manager, a warehouse worker, and an administrative-import assistant. As discussed above, the petitioner's staff also included a part-time office manager. Despite the petitioner's claims, there is no evidence that it utilized outside sales representatives at the time the immigrant visa petition was filed. According to a list submitted by the petitioner in response to the director's request for evidence, its three sales representatives began selling the petitioner's products in September and October 2005, at least two months after the present filing date. Also, each of the three Internal Revenue Service (IRS) Forms 1099 issued by the petitioner in 2005 reflected compensation paid only to those three representatives obtained after the filing. There is no evidence that on the date of filing the petitioner contracted with "Roselinde Porcelain," "Calendar Club," "Oriental Trading[1]," or "Kashu Sales," the companies identified on its initial organizational chart, for sales services.

The petitioner has not established who would be responsible for performing its sales functions, which, according to the petitioner, includes the use of such avenues as direct mail, exhibitions, catalogs, and the company website. The AAO notes that the petitioner maintains separate sales departments for its porcelain items and home furnishings, thereby suggesting the need for multiple sales employees or representatives. As discussed above, the petitioner also failed to account for the performance of its marketing and production functions. Based on the petitioner's representations, the beneficiary appears to be personally responsible for the performance of any related non-managerial and non-executive tasks. The record as presently constituted

[1] The AAO recognizes that the petitioner is doing business as Oriental Trading through its home furniture department. However, the date on which it commenced operations is not clear as the petitioner noted on its list of commissioned sales representatives that Oriental Trading was "hired" in September 2005.

does not support a finding that the petitioner's reasonable needs might plausibly be met by the services of the beneficiary and his support staff.

Counsel claims on appeal that the beneficiary would supervise managerial and supervisory employees and would exercise wide latitude in discretionary decision-making, thereby satisfying the statutory criteria of "managerial capacity." The AAO notes that the petitioner's obligation in establishing the beneficiary's classification as a manager or executive goes beyond merely restating the statutory definitions. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (stating that conclusory assertions or restatements of the language of the statute or regulations do not satisfy the petitioner's burden of establishing the beneficiary as a manager or executive). In order to establish that the beneficiary would be employed in a primarily managerial or executive capacity, the petitioner must first show that the beneficiary performs the high-level responsibilities that are specified in the definitions. The petitioner holds the additional responsibility of demonstrating that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). As discussed above, the petitioner has not satisfied this obligation.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The AAO recognizes that CIS previously approved three L-1A nonimmigrant visa petitions filed by the petitioner on behalf of the beneficiary. It should be noted that, in general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. The AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See* §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427.

In addition, unless a petition seeks extension of a "new office" petition, the regulations allow for the approval of an L-1 extension without any supporting evidence and CIS normally accords the petitions a less substantial review. *See* 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). Because CIS spends less time reviewing L-1 petitions than Form I-140 immigrant petitions, some nonimmigrant L-1 petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003).

Moreover, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The prior nonimmigrant approvals do not preclude CIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch,* 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. CIS denies many I-140 petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*,

293 F. Supp. 2d at 25; *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d at 22; *Fedin Brothers Co. Ltd. v. Sava,* 724 F. Supp. at 1103.

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Due to the lack of required evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approvals by denying the present immigrant petition.

Finally, 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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.