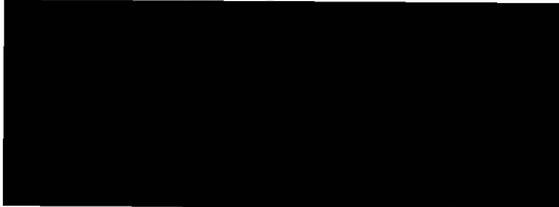


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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **OCT 24 2006**
EAC 04 040 50206

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:
[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 preference visa petition was denied by the Director, Vermont Service Center. The petitioner subsequently filed a timely appeal with the Administrative Appeals Office (AAO). The Service Center improperly determined that the appeal lacked a proper signature from the petitioner and subsequently rejected it as untimely filed when the petitioner resubmitted the appeal. A number of motions have since been filed in response to the Service Center's improper rejection of the appeal. Accordingly, the director's decision rejecting the appeal and all of her subsequent responses to counsel's motions are hereby withdrawn. Accordingly, the AAO has considered the petitioner's entire record, including all evidence and information submitted on appeal. The AAO's findings are discussed in a full decision below. The AAO has determined that a favorable outcome is not warranted in the instant matter. Therefore, the appeal will be dismissed.

The petitioner is a New York corporation operating as an importer and clothing retailer. 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 denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her arguments. Based on a thorough review of the record in its entirety, the AAO concludes that the petitioner has adequately met its burden of establishing by a preponderance of the evidence that the beneficiary was employed abroad in a qualifying managerial capacity. As such, the discussion below will focus primarily on the single remaining ground of ineligibility cited in the director's decision.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 primary issue in this proceeding is whether the petitioner would employ the beneficiary in a 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) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated October 21, 2003, which the petitioner provided in support of the petition, the petitioner stated that the beneficiary has played an integral part in increasing the company's business growth and net profits. The petitioner also stated that the beneficiary has a good relationship with the company's customers and suppliers. Although the petitioner stated that the beneficiary's responsibility would include forming relationships with suppliers and manufacturers in China and Hong Kong, a more specific list of duties or responsibilities was not provided.

In an attempt to elicit further information, the director issued a request for additional evidence (RFE) dated April 22, 2004. The petitioner was instructed to provide the following documentation to assist Citizenship and Immigration Services (CIS) in determining the beneficiary's employment capacity in the proposed position in the United States: 1) a detailed description of the beneficiary's proposed day-to-day duties with an hourly breakdown indicating how much of the beneficiary's time would be devoted to each of the listed duties; 2) the petitioner's organizational chart illustrating its management and executive structure and identifying the positions to be managed by the beneficiary; 3) the petitioner's 2003 tax return, W-2 tax statements issued by the petitioner in 2003, the petitioner's fourth quarterly wage report for 2003, and the petitioner's payroll roster for 2003.

In response, counsel provided a letter dated July 6, 2004 addressing each of the director's concerns. With regard to the request for a detailed breakdown of duties, the following was submitted:

- Sales and contract negotiation with American buyers (10 hours per week)[.]
- Meet with supervisory managers directly subordinate to the [b]eneficiary regarding meeting production demands, solving production problems in the China factory, and fulfilling sales terms (15 hours per week)[.]
- Meet with [the] company vice president and manager regarding production, sales and marketing strategies, corporate policies (10 hours per week)[.]
- Plan for upcoming production (5 hours per week)[.]
- Travel to China factor and other foreign suppliers (variable)[.]
- Hire and fire supervisory managers (variable)[.]
- Oversee and communicate with the Nanjing office of [the petitioner] (variable hours)[.]

The petitioner fully complied with the director's request for financial documents submitting sufficient documentation to establish who worked for the petitioner at the time the petition was filed. The petitioner also submitted its organizational chart, which identifies the beneficiary at the top of the staffing hierarchy. The chart further shows that the vice president of the company is the beneficiary's direct subordinate. The vice president's subordinate is a sales manager whose three subordinates include a production clerk, a sales associate, and the company secretary. According to the salaries provided in the petitioner's fourth quarterly wage report for 2003 and the petitioner's payroll roster for 2003, the petitioner employed four individuals on a full-time basis, while two of its employees received salaries that were commensurate with part-time employment. Although counsel stated that the petitioner paid additional commissions that were not reflected

in the submitted W-2s and W-3s, documentation was not submitted to establish the amount of commissions paid and the recipient(s) of the commissions.

On August 31, 2004, the director denied the petition. The director observed that only two out of the six individuals named in the petitioner's 2004 fourth quarterly wage statement were receiving wages commensurate with those of full-time employees. However, a review of the petitioner's payroll roster and its 2004 fourth quarterly wage report both show that four out of six individuals received wages commensurate with those of full-time employees.

The director also observed that the positions of the petitioner's staff members did not appear to be managerial or executive. However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a professional, managerial, or supervisory employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-managerial or non-executive staff.

Additionally, the director commented on the petitioner's failure to provide employee names and job descriptions on the submitted organizational chart. However, as properly noted in counsel's brief, the RFE did not specifically request that the organizational chart include employee names and position descriptions, information which the petitioner provided in the response letter dated July 6, 2004. Nor did the RFE include a request for an hourly breakdown of duties of the petitioner's employees other than the beneficiary. As accurately pointed out by counsel, the hourly breakdown referred only to the beneficiary's job duties, not to those of the beneficiary's subordinates.

Accordingly, the director's erroneous observations are hereby withdrawn. However, a review of the record suggests that the director's ultimate conclusion with regard to the beneficiary's prospective employment and consequently the petitioner's overall eligibility is correct. In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant matter, the director properly observed that the description of the beneficiary's proposed position is too general to convey an understanding of exactly what duties the beneficiary would be performing on a daily basis. While the petitioner has provided an hourly breakdown of the beneficiary's vague job responsibilities, 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Stating that 25 hours (which is more than 50% of the beneficiary's time) would be spent meeting with various subordinate employees does not identify the specific duties that would be performed. Further, the fact that the beneficiary would directly engage in sales and contract negotiations with the petitioner's clientele strongly suggests that at least 25% of the beneficiary's time would involve the performance of non-qualifying tasks. Thus, based on the petitioner's hourly breakdown, over 70% of the beneficiary's job duties are either undefined or are non-qualifying.

Additionally, the tax documentation provided by the petitioner shows that the sales associate and production clerk both received salaries that were commensurate with those of part-time employees. As noted above, although counsel suggests that the petitioner paid commissions which were not included in the W-2s or W-3s, no documentation was submitted to corroborate this claim. 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).

While the size of the petitioner's support staff is not the determining factor of a petitioner's eligibility, this factor can and should be considered for the purpose of examining the petitioner's ability to relieve the beneficiary from having to perform non-qualifying tasks. When a petitioner's business relies in large part on selling and marketing a particular product, the lack of a sufficient staff to perform these essential functions raises doubt as to the petitioner's ability to relieve the beneficiary from having to engage in the performance of the non-qualifying duties related to those functions. Furthermore, the petitioner's description of the beneficiary's proposed position indicates that the beneficiary is directly engaged in sales and contract negotiation, neither of which can be deemed as qualifying duties. While these non-qualifying duties admittedly consume only 25% of the beneficiary's time according to the petitioner's hourly breakdown, the petitioner failed to specify the actual duties that would consume more than 50% of the hourly breakdown. 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.

Despite counsel's detailed account of the petitioner's business activity, the petitioner must provide a detailed account of the duties the beneficiary is expected to perform given the nature of the business in which the petitioner engages and the support staff available at the time the petition was filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Counsel cannot expect the AAO to assume that the beneficiary's duties would be primarily of a qualifying nature if those duties are not specifically defined. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. In the instant matter, the record shows that at the time the petition was filed, the petitioner had a limited support staff. This factor coupled with the lack of a detailed description of the beneficiary's proposed duties preclude the AAO from concluding that the beneficiary would be employed in a qualifying managerial or executive capacity.

Finally, counsel makes a brief reference to the petitioner's approved L-1 employment of the beneficiary. With regard to the beneficiary's L-1 nonimmigrant classification, 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, 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 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 immigrant 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 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).

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.