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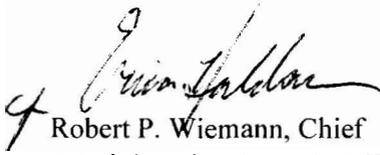
IN RE: Petitioner:
Beneficiary:

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, 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 sale of computer products. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, the petitioner challenges the director's finding that the beneficiary would not be employed in a primarily managerial or executive capacity, claiming that the evidence previously submitted was not reviewed "attentively." In support of the appeal, counsel submits a statement from the petitioner and documentary evidence that had been previously offered by the petitioner.

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 the instant 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 Form I-140 on September 23, 2005, noting the beneficiary's proposed employment as president of the four-person United States company. In an attached letter, dated September 25, 2005, the petitioner addressed the beneficiary's employment in the United States, stating that as the president he "supervises the daily operation of the company," makes sales and marketing policy decisions, "carr[ies] out the marketing development plan decided by the [foreign entity's] board of directors," and represents the petitioner in negotiations with United States companies. The petitioner further stated:

Functioning autonomously, [the beneficiary] is responsible for managing and directing all activities of [the petitioning entity], which includes supervision of the company's daily operation, policy decision making in regard to sales and marketing, and representation of [the petitioner] in negotiation and forming of strategic alliance with other US computer

companies. He represents the unique concerns and requirements of the international operations to headquarter [sic] in Taipei and provides significant contributions in the formulation of strategic plan [sic] as well as sales and marketing plan [sic] to ensure that the business and strategic policies are effectively incorporated [sic] into [the foreign entity's] global business activities.

[The beneficiary] also establishes and promotes the standardization of customer support and service based on the corporate model of [the foreign organization]. He meets regularly with various managers of subsidiaries of [the foreign organization] to review current policies and procedures and develop appropriate plans necessary to ensure consistency of development and marketing practice in accordance with corporate standards. He formulates strategies and plans to improve the communication between various subsidiaries of [the foreign organization] and establishes and promotes standardization in the delivery of information, products and services to the customers of [the foreign entity].

The petitioner noted the beneficiary's management of its three employees, consisting of a sales manager, administration-finance manager, and sales assistant, all of which were identified on an attached organizational chart, in addition to the beneficiary's positions of president and marketing manager.

An appended letter from the foreign organization, dated September 19, 2005, restated essentially the same descriptions of the beneficiary's proposed employment in the United States, and stressed the importance of employing the beneficiary, stating:

The aforesaid experience of [the beneficiary] is necessary and requisite to fill the duties of [p]resident of [the petitioning entity]. Those duties are essentially similar to the duties filled in the overseas positions. The key element of these duties is the management of the sales and finance departments and coordination of sales and production of [the foreign entity] in order to meet OEM customers' needs. This coordination task is one requiring strong managerial skills, skills developed only after a number of years of preparation. [The beneficiary's] long-term experience with [the foreign entity] assures that he will be able to execute this assignment in conformity with [the foreign organization's] standards. [The beneficiary] is the ideal candidate to run the operation of [the petitioner] and has demonstrated considerable skill in organizing and management [sic] of international business as well as sales and marketing of [the foreign entity's] products.

Counsel for the petitioner submitted a copy of the beneficiary's resume and an additional job description for the beneficiary, in which the petitioner stated that the beneficiary's "major objective is to generate new sales and servicing [sic] existing accounts at targeted global/multinational electronic OEM and subcontractor accounts through skilled account management." The petitioner noted the beneficiary's "key" related tasks included: "developing, implementing, [and] managing a focused sales and marketing program and leading customer focused sales teams." The petitioner also offered a brief description of the beneficiary's managerial authority over the sales manager and administration-finance manager.

The director issued a request for evidence on March 6, 2006, directing the petitioner to submit additional evidence in support of the beneficiary's proposed employment in a primarily managerial or executive capacity, including a "more detailed description" of the specific job duties to be performed by the beneficiary

during a "typical day," as well as an organizational chart describing the job duties and educational levels of all workers employed subordinate to the beneficiary. The director also requested copies of the petitioner's third and fourth quarter wage reports filed during 2005.

Counsel for the petitioner responded in a letter dated May 24, 2006. In an attached undated letter, the petitioner outlined the following "key management task[s]" of the beneficiary related to the company's goal of generating new sales and servicing existing accounts:

1. Direct the management of the U.S. company
2. [S]et[-]up company goal goals [sic] and policies of the U.S. company
3. [L]ead a customer-focused sales team (sales manager, marketing manager and administration/finance manager) to develop, implement, [and] manage a focused sales and marketing program
4. [E]xercise wide latitude in discretionary decision-making

The petitioner further outlined the following tasks in the beneficiary's typical workday:

1. Help all employees to understand, develop, affect and impact strategies to drive all [of the petitioner's] cabling solutions (data cable, interconnect design and networking accessories) to assigned target accounts.
2. Monitor [the] company's administration and finance employee to establish common administration process platform and sharing of best practices.
3. Work with [the] company's sales and marketing specialist to develop an [a]ccount [p]lan and effectively communicate and implement the account strategy through effective sales management system.
4. Establish inter-corporate and public relationships for effective business operation.

The petitioner noted that the beneficiary had made such "discretionary decisions" as: setting up the company's office management tools and sales service system; deciding "ways" to increase company sales; and "[judging] means of conducting multinational logistic control among U.S., Japan and Taiwan."

The petitioner provided a similar organizational chart as that previously submitted, explaining that each of the beneficiary's subordinate employees hold a bachelor's degree and are employed as both managers and professionals, and again noted that the beneficiary was performing in the position of marketing manager. The petitioner offered a description of the job duties performed in each of the subordinate positions, noting that the responsibilities related to the position of marketing manager included: (1) identifying and building business relationships with "[k]ey [i]nfluencers; (2) analyzing customer needs and developing product specifications; (3) "[managing] systems and manufacturing integration strategies"; and (4) "sharing industry knowledge with company members" and the foreign company's sales and research and development departments.

The petitioner also addressed its "supply chain system," documenting why it does not require the employment of customs, warehousing and distributions employees. The petitioner explained that when its United States customers sell overseas, any orders generated from the foreign customers are "outsourced" or filled by the foreign organization and shipped directly to the foreign customers.

The petitioner also claimed that while the beneficiary occupied the position of marketing manager at the time the petition was filed he did not "necessarily assume the duties of the marketing manager." The petitioner explained its "collaboration" with the foreign company, and specifically its marketing manager, through the use of cell phones and wireless technology, that allows "backup and support" in the absence of a marketing manager.

In a decision dated July 27, 2006, the director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director recited the "vague and nonspecific" descriptions offered for the beneficiary's position as president, concluding that they did not establish what the beneficiary would do on a day-to-day basis. The director stated that the petitioner had not defined the goals, policies, or strategies of the organization, or identified who would perform the marketing, budgeting, finance, accounting, advertising, and personnel functions of the United States organization. The director noted that the beneficiary's title of president, by itself, is not sufficient to establish his employment in a primarily managerial or executive capacity. The director further concluded from the petitioner's quarterly wage reports that the company's sales manager was employed on a part-time basis on the filing date, and questioned whether the petitioner's staffing levels were sufficient to support the beneficiary in a primarily managerial or executive capacity. The director concluded that the beneficiary would be personally responsible for performing day-to-day non-supervisory tasks of the United States organization and would not be employed in a primarily managerial or executive position. Consequently, the director denied the petition.

Counsel for the petitioner filed a timely appeal on August 23, 2006. In an appended letter, dated August 21, 2006, the petitioner challenges the director's review of the record, stating that "[Citizenship and Immigration Services (CIS)] did not look through it attentively." The AAO notes that a significant portion of the petitioner's letter on appeal restates the evidence previously offered in support of the petition, which has been outlined above, and therefore will not be repeated herein. The petitioner disputes the director's finding that the job description was vague and nonspecific, stating that a "step-by-step description" of the typical daily job duties, goals, policies and discretionary decisions was offered in response to the director's request for evidence. The petitioner contends that this evidence "shows the beneficiary is making policy decision[s] for the company and how he exercises the discretionary decisions while managing and supervising his manager [sic] group on a day-to-day basis."

The petitioner stresses the employment of a managerial and professional staff subordinate to the beneficiary, claiming that the director erroneously determined the beneficiary to be a first-line supervisor. The petitioner states that CIS is obligated to consider the petitioner's reasonable needs with respect to its overall stage and purpose when taking into consideration its staffing levels, claiming that the record demonstrates a subordinate staff sufficient to support the beneficiary in a primarily managerial or executive position. The petitioner further questions CIS' finding that its sales manager was employed on a part-time basis, stating that the position "has always been a full-time job" that allows the sales manager "[to] play a very important role in our value-creation team and takes care of myriads of duties over our day-to-day operation."

The petitioner again references the previously submitted documentation as evidence that the beneficiary "has the ultimate managerial capacity to manage its U.S. business organization, and supervise and control the work of professional and managerial employees; he has the full power to arrange personnel actions, and exercise discretionary decision[s] over the day-to-day operation within the organization – all of these qualify for both

Section 203(b)(1)(C) [of the Act] and [Section] 101(a)(44)(B) [of the Act] definitions." In support of the appeal, the petitioner again submits the company's organizational chart and the beneficiary's resume.

Upon review, the petitioner has not established 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 determined by the director, the descriptions offered by the petitioner are not sufficient to demonstrate the beneficiary's claimed primarily managerial or executive employment. The statements initially offered by the petitioner with respect to the beneficiary's supervision over daily operations, development of sales and marketing policies, and formulation of "business and strategic policies" are merely broad examples of responsibilities held by the beneficiary. Similarly, despite the director's request for specific and detailed daily job duties, the petitioner again listed such vague responsibilities as: "direct" the company's management; "lead" the sales team; develop company goals; and "exercise wide latitude in discretionary decision-making." The supplemental description of the beneficiary's typical workday is equally vague, stating only that the beneficiary would "monitor" or "[w]ork" with subordinate employees and develop corporate relationships. None of the offered evidence identifies specific managerial or executive job duties to be performed by the beneficiary in his position as president. 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 merely assigning a managerial or executive title to the beneficiary is not sufficient to establish his or her employment in a qualifying managerial or executive capacity. The regulations require a clear description of the duties to be performed by the beneficiary, such that the beneficiary would be deemed a manager or executive. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has failed to satisfy this essential requirement of eligibility.

Additionally, the record suggests that the beneficiary would not be performing primarily managerial or executive job duties, but rather the non-qualifying tasks related to the business' marketing function. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove 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).

In both its initial letter and statement in response to the director's request for evidence, the director noted the beneficiary's employment in the positions of president and marketing manager. As outlined above, the tasks of the marketing manager would include identifying and cultivating business relationships, negotiating with outside computer companies, choosing appropriate products, analyzing customer needs and product development specifications, "[leading] and manag[ing] systems and manufacturing integration strategies," and instructing the foreign company on industry trends. The beneficiary is also identified in the petitioner's September 5, 2005 letter as the only person qualified to handle "complicated business transaction[s] among

manufacturer[s], vendor[s], purchaser[s], reseller[s] and bank[s]," and as "the person to carry out the marketing development plan." Based on these representations, the beneficiary's purported employment in a primarily managerial or executive capacity is significantly undercut. The above-named marketing responsibilities are not typically deemed managerial or executive in nature. See §§ 101(a)(44)(A) and (B) of the Act. As a result, it is questionable how much time the beneficiary would spend performing these non-managerial or non-executive tasks, or, in essence, performing the non-qualifying marketing function of the petitioning entity.

The beneficiary's role as marketing manager is particularly relevant considering the petitioner's "niche" of selling "strategic insight," which, according to the petitioner, involves: developing a customer-specific sales strategy, "managing a focused sales and marketing program," and "leading a focused sales team." The petitioner emphasizes these particular functions throughout its statement on appeal, thus stressing the magnitude of the sales and marketing functions in the success of the petitioner's business in the United States. As the sole marketing employee of the petitioning entity, the beneficiary's responsibility of performing its marketing functions seems especially vital to the business, thus suggesting the non-qualifying marketing tasks would account for a primary portion of the beneficiary's employment in the United States. 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 petitioner has not submitted credible and independent evidence that the beneficiary would be relieved from performing the marketing function of the United States business. Despite its initial claims, the petitioner subsequently alleges that while the beneficiary "is currently acting" as the marketing manager, he "doesn't necessarily assume the duties of the marketing manager." The petitioner points to the foreign entity's marketing manager, as well as technological advances, such as cellular telephones and electronic mail, as alleviating the petitioner of its marketing functions. 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). Here, the petitioner's claim that the beneficiary is relieved of performing the company's marketing functions is essential to determining his employment in either a managerial or executive capacity. The petitioner's unsupported statement is not sufficient to overcome its initial representations that the beneficiary would perform tasks related to the position of marketing manager. 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)). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner correctly observes 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.* Based on the above discussion, it does not appear that the petitioner's reasonable needs would be met through the services of the beneficiary and its three other employees. Again, the record as presently constituted suggests that the reasonable needs of the petitioning organization, whose niche is based on its sales and marketing program, would not be met without the beneficiary's performance of non-managerial or non-executive duties.

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) of the Act. As discussed above, the limited job descriptions offered by the petitioner do not satisfy this essential element of eligibility.

The petitioner also emphasizes on appeal that the beneficiary's subordinates are both managers and professionals, thus challenging the director's finding that the beneficiary is a first-line supervisor. Even if the beneficiary's subordinates could be considered managers, this factor alone is not sufficient to establish his employment in a managerial capacity. The statutory definition of "managerial capacity" requires the petitioner to demonstrate that the beneficiary's employment in the United States would satisfy all four elements, and to establish that the beneficiary's actual duties are primarily managerial. *See* § 101(a)(44)(A) of the Act.

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

The AAO recognizes that CIS previously approved an L-1A nonimmigrant petition filed on behalf of the beneficiary. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Furthermore, 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. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the prior nonimmigrant petition approval and denying the immigrant petition.

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.

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ORDER: The appeal is dismissed.