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File: [REDACTED] Office: TEXAS SERVICE CENTER Date: **AUG 03 2007**
SRC 06 149 51744

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

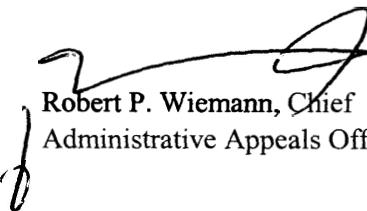
Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 Director, Texas Service Center, denied the employment-based immigrant 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 petition seeking 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 petitioner, a Texas corporation, states that it operates as a wholesale distributor of manufactured uniforms. It seeks to employ the beneficiary as its president.

The director denied the petition on November 27, 2006, determining that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States company.

The petitioner subsequently filed a motion to reopen, or, in the alternative, appeal, on December 28, 2006. On appeal, counsel for the petitioner states that since the submission of the Form I-140 and the reply to the director's request for evidence, the petitioner has rented larger office space and hired two employees. Counsel emphasizes that the beneficiary continues to manage the petitioner's Mexican affiliate and travels regularly to China and Taiwan. Counsel asserts that the leasing of additional space and the employment of two employees "speak to the expansion of the business and plans for further success." Counsel submitted a brief and additional documentary evidence, including a letter from the petitioner, in support of the motion to reconsider, and requested 90 days to submit a brief in the event that the matter is treated as an appeal. As of this date, no appellate brief has been incorporated into the record.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this

classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. See 8 C.F.R. § 204.5(j)(5).

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 immigrant petition was filed on April 12, 2006. The petitioner stated on Form I-140 that the U.S. company has one employee and will employ the beneficiary as its president. In a letter dated April 4, 2006, the petitioner stated that the U.S. company functions primarily as a sales and distribution office, and also purchases raw materials from U.S.-based companies for export to Mexico. The petitioner described the beneficiary's duties as president as follows:

[The beneficiary] provides the overall direction and management of the U.S. company, managing and directing the accumulation of new U.S. business contacts and distribution points. He will use his executive experience and decision-making skills to ensure high quality product with low costs. In his position, he has wide latitude in making decisions that will be beneficial for the company in both short-term and long-term runs. Additionally, he also manages and directs the negotiations of lease contracts, negotiating contracts with the production facility in Mexico, and is responsible for import licensing and distribution. In his executive capacity as President, [the beneficiary] continues to have wide discretion over day-to-day activities of [the petitioner] as well as the authority to establish goals and policies of the organization. He will implement these policies and goals through the U.S. and Mexico employees. Furthermore, he has the ability to hire or terminate employees in either the Mexican or U.S. branch of the company.

In a separate statement describing the corporate structure for the petitioner and its Mexican affiliate, the petitioner stated "distribution demands in the U.S. are expected to increase exponentially, and [the beneficiary] plans to employ 1-2 sales persons, and 1-2 administrative staff members in his U.S. offices in the Dallas area very soon." The petitioner stated that the beneficiary would continue to supervise the Mexican company's seven employees as Director/CEO of that company and provided a description of each employee's duties, which will not be repeated herein.

On July 6, 2006, the director issued a request for additional evidence, in part, requesting that the petitioner describe the beneficiary's proposed U.S. assignment in greater detail, including all duties and functions he will perform. The director instructed the petitioner to describe the organizational hierarchy of the U.S. office and to clarify how the reasonable needs of the U.S. organization in light of its overall purpose and stage of development allow the beneficiary to function primarily as an executive or manager. In addition, the director requested evidence of the petitioner's current staffing level and detailed position descriptions for all employees of the U.S. company. Finally, the director noted that the petitioner should submit documentary evidence of payments to any contract employees, and position descriptions for such employees, if applicable.

In a response dated September 29, 2006, former counsel for the petitioner confirmed that the beneficiary is the U.S. company's only full-time employee, but noted that the company "is in the process of expanding the business by hiring 2-4 employees in the next few months." Counsel stated that the company had outsourced "much of its administrative and manual duties," and submitted invoices showing the beneficiary's use of shipping and freight companies and customs brokers to ship and receive goods to and from China and Mexico and across the United States. Counsel indicated that the company's accounting and legal needs were also outsourced to outside firms. Finally, counsel stated that the petitioner, for the previous four years, had relied on the services of the Mexican affiliate to provide "administrative support," and provided examples of how

the Mexican employees have assisted the beneficiary with the U.S. company's activities, such as researching fabrics in the Mexican market, expediting orders or creating samples for the U.S. office.

In a letter dated September 27, 2006, the petitioner re-iterated the job description submitted in support of the initial petition, and stated that in the fiscal year commencing on October 1, 2006, the petitioner will hire a receptionist/office assistant, a warehouse manager, a sales manager, and a salesperson.

The director denied the petitioner on November 27, 2006, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director acknowledged the position description submitted for the beneficiary and the petitioner's statement that the petitioner intends to hire sales, warehouse and administrative staff in the future. The director determined that the beneficiary has been performing these functions himself as the petitioner's sole employee and was primarily engaged in such non-qualifying tasks at the time the petition was filed. The director recognized that the beneficiary may make decisions regarding the operation of the company as its president and shareholder, however, the director concluded that the record did not establish that such duties require the majority of his time. Rather, the director determined that the beneficiary would be primarily engaged in the company's daily productive tasks.

On appeal, new counsel for the petitioner asserts that the petitioner rented larger office space and hired two employees subsequent to submitting its response to the director's request for evidence. The petitioner submits a lease agreement for an executive office with a maximum occupancy of two people, valid from December 1, 2006, and states that "two previous contract employees" were made permanent employees as of October 15, 2006. Counsel indicates that the two employees are an auditing/quality control manager responsible for "performing all logistic steps require to deliver goods from China to the U.S," and a market research and sourcing employee who is responsible for locating "the best priced and best quality goods available." Counsel emphasizes that the beneficiary continues to manage the Mexican office and visits there six to eight times annually. Counsel asserts that the evidence submitted demonstrates the expansion of the U.S. company and "plans for further success."

In support of the appeal, the petitioner submits a letter dated December 28, 2006, in which the beneficiary states that many of the responsibilities performed by the two above-referenced employees were previously personally performed by him. The beneficiary states that he recently began purchasing, importing and exporting golf carts, electronics and mattresses to Mexico, and has been able to hire the new employees as a result of these new opportunities. The beneficiary further indicates that he intends to obtain a warehouse facility, hire warehouse staff, and open a retail store. Finally, the beneficiary emphasizes that he is "the ultimate decision-maker" for both the Mexican and United States entities.

Upon review of the record in this matter and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed 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.*

The petitioner's description of the beneficiary's duties, when considered in light of the totality of the record, does not support a conclusion that he will be employed in a primarily managerial or executive capacity. The definitions of executive and managerial capacity have two specific requirements. 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).

While the beneficiary will evidently exercise authority over the U.S. entity as the sole shareholder and president of the company, the petitioner has failed to establish that the beneficiary's day-to-day duties are primarily managerial or executive in nature. The petitioner's initial description of the beneficiary's duties was vague and failed to convey any understanding of what actual tasks the beneficiary performs on a day-to-day basis. Portions of the description merely paraphrased the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act; 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner indicated that the beneficiary has "the authority to establish goals and policies of the organization," has "wide discretion over day-to-day activities," and "provides the overall direction and management of the U.S. company." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The remainder of the beneficiary's position description was similarly generalized, as the petitioner indicated that he is responsible to "ensure high quality product with low costs," negotiates contracts," manages and directs "the accumulation of new U.S. business contacts and distribution points," and "is responsible for import licensing and distributing." While the petitioner presents these as managerial or executive duties, the petitioner failed to clearly outline who is responsible for non-managerial duties associated with the company's marketing, sales, purchasing, distribution, import, quality control and other routine aspects of the company's day-to-day operations as a sales, sourcing, and distribution company. Without further explanation, it cannot be determined whether the beneficiary manages these functions through subordinate personnel or outsourced labor, or whether he performs these non-qualifying tasks himself. 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Accordingly, the director reasonably requested that the petitioner describe the beneficiary's position in greater detail and clearly indicate the actual duties he will perform as president of the petitioning company. In response, the petitioner submitted essentially the same position description without clarifying the beneficiary's actual duties. 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).

The petitioner did, however, respond to the director's request that the petitioner clarify how the beneficiary, as the petitioner's sole employee, is relieved from performing primarily non-managerial and non-executive

duties. The petitioner noted that the beneficiary utilized the services of an accountant, an attorney, and shipping and freight companies, and relied on the U.S. company's Mexican affiliate to provide "administrative support." The role of the Mexican employees in carrying out the day-to-day non-managerial duties of the U.S. company has not been fully explained. While it is plausible that the Mexican employees are able to coordinate orders with Mexican manufacturers, take care of import and export activities between the two countries, and perform research and source goods in the Mexican market, the petitioner has placed much emphasis on the beneficiary's dealings with Chinese suppliers and has not indicated that the Mexican employees are involved in researching the Chinese market or purchasing goods and materials from China.

Furthermore, the AAO notes that the petitioner describes the U.S. company as primarily a sales office, and yet neither the petitioner nor its Mexican affiliate employs a sales staff. As the beneficiary is the sole employee of the U.S. sales office, it is reasonable to assume, and has not been shown otherwise, that he personally performs the petitioner's sales function. According to the position description for the Mexican affiliate's general manager, the president of the U.S. company, i.e., the beneficiary, is responsible for obtaining purchase orders and specification sheets from U.S. customers and forwarding them to the Mexican company. While the petitioner indicates its intent to hire a sales manager and salesperson "within the next few months," it does not indicate who currently performs the petitioner's sales function, if not the beneficiary. 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 evidence submitted on appeal does not assist in determining that the beneficiary was employed in a primarily managerial or executive capacity as of the date of filing. Counsel introduces two "previous contract employees," the "auditing/quality control manager" and "market research & sourcing" employee, noting that they became full-time employees shortly after the petitioner submitted its response to the director's request for evidence. Counsel offers no documentary evidence in support of his statement that these two employees were employed as contractors prior to being hired on a full-time basis. The petitioner was specifically requested to provide evidence of any payments to contract employees and did not mention either of these individuals in its September 2006 response to the director's request for evidence. 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).

Furthermore, while counsel suggests that the two newly hired employees have been assisting the beneficiary as contractors, the beneficiary himself concedes that the non-qualifying duties performed by the new employees were previously performed by him personally, and makes no mention of their previous employment as contractors. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

An analysis of the reasonable needs of the corporation in conjunction with its overall purpose and stage of development undermines the petitioner's claim that the beneficiary would be employed in a primarily

managerial or executive capacity, as the record does not show that the outsourced services or the employees of the petitioner's Mexican affiliate would relieve the beneficiary from performing many of the day-to-day functions of operating the U.S. sales office. 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 U.S. Citizenship and Immigration Services (USCIS) 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.*

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's ongoing performance of non-qualifying duties four years after the establishment of the company. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. While the beneficiary would be required to perform some managerial or executive duties as the sole employee of the company, based on the totality of the record, it is evident that the majority of his time would necessarily be allocated to obtaining orders from U.S. customers, sourcing materials in the Chinese market, and performing other duties now attributed to his newly-hired subordinates.

Finally, it is noted that neither counsel nor the petitioner specifically objects to the director's findings on appeal. Rather, counsel emphasizes that the petitioner has rented a larger office, with a maximum occupancy of two people, and hired two employees subsequent to its response to the director's request for evidence. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *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 USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If the petitioner or beneficiary become eligible under a new set of facts, the proper course of action is to file a new petition. Despite the previous denial, there is no bar to the petitioner's filing of a new petition supported by new evidence of eligibility.

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

The AAO recognizes that CIS previously approved an L-1A nonimmigrant visa petition filed by the petitioner on behalf of the beneficiary for employment as its president. In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by USCIS 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. Because USCIS 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. *See* 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii). The prior nonimmigrant approvals do not preclude USCIS 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. USCIS 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 petition was 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 approval 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.

ORDER: The appeal is dismissed.