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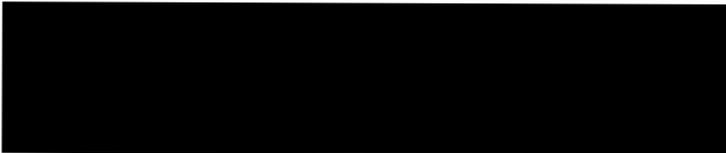
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 17 2007  
WAC 06 007 51309

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

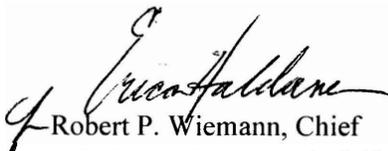
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to  
the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 claims to be the affiliate of the beneficiary's foreign employer. The petitioner is operating in the United States as a garment, handicraft and jewelry distributor, and 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, counsel for the petitioner challenges the director's finding, claiming that the beneficiary qualifies for the requested immigrant visa classification.

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

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

\* \* \*

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

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

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

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

The petitioner filed the Form I-140 on September 30, 2005, noting that the beneficiary would occupy the position of president in the four-person company, which would include performing as a functional manager. In an appended letter, dated September 27, 2005, the petitioner noted the beneficiary's success in increasing the company's sales since its formation in 2000, and provided the following list of job duties associated with the beneficiary's proposed employment:

- 1) Giving ultimate approval to the designs created by the Garments Supervisor and the Handicrafts Supervisor, who research market trends and create designs accordingly.
- 2) Giving ultimate approval to the suppliers targeted by the Garments and Jewelry Supervisor and the Handicrafts Supervisor for the creation of products[.]

- 3) Evaluating and giving ultimate approval to distribution strategies formulated by the Garments and Jewelry Supervisor and the Handicrafts Supervisor[.]
- 4) Arranging with [the foreign entity] for financing as necessary[.]
- 5) Developing strategic business plans for Petitioner[.]
- 6) Setting realistic revenue goals for Petitioner[.]
- 7) Supervising outside professionals to ensure that Petitioner meets statutory and regulatory requirements and employs financial strategies most beneficial to Petitioner[.]
- 8) Presenting plans and obtaining board approval for capital investment as needed.
- 9) Obtaining additional bank credit lines if required[.]
- 10) Developing Petitioner's hiring policies and hiring and firing employees as necessary[.]
- 11) Making decisions regarding the location of Petitioner's physical premises[.]

In her capacity as President of Petitioner, [the] Beneficiary manages two essential functions of Petitioner's business: 1) the design of fabrics, handicrafts, and garments[,] and 2) their distribution. While she does not perform day-to-day, hands-on design or distribution duties, [the] Beneficiary's training in design and her intimate knowledge of [the foreign entity's] distinctive styles of design and distribution practices make her uniquely qualified to manage these functions. . . .

The petitioner further noted the beneficiary's supervision of two full-time employees who occupied the positions of handicrafts supervisor and jewelry and garments supervisor, as well as one part-time employee, who, based on the attached organizational chart, appears to be employed as office support. The petitioner further indicated on a second organizational chart submitted with its response to the director's request for evidence that its office support employee worked eight hours a week during the month the instant petition was filed. Also, according to both the original and revised organizational charts offered by the petitioner, neither supervisor is supervising lower-level employees. The petitioner's quarterly wage report for the period ending September 30, 2005 confirmed the petitioner's employment of the full-time three-person staff and one part-time worker.

On June 22, 2006, the director issued a request for evidence, directing the petitioner to submit the following documentation: (1) an organizational chart identifying the names and job titles of its employees; (2) a brief description of the job duties performed by the beneficiary's subordinates and the approximate number of hours per week each employee works; (3) a description of the specific job duties performed by the beneficiary during a typical work day, and the percentage of time the beneficiary would devote to performing each task; and, (4) copies of the petitioner's Internal Revenue Service (IRS) Forms W-2 and Forms 1099 evidencing wages paid to its employees during the years 2003 through 2005.

Counsel for the petitioner responded in a letter dated August 31, 2006, providing the following description of the daily job duties associated with the beneficiary's employment:

[I]nformal meetings with employees regarding the previous day's sales and perceived customer problems (25%); formal meeting with staff for resolution of distribution-related issues (10%); discussion of marketing and design issues with staff, especially [the handicrafts supervisor] (25%); meetings with current and potential clients (35%); meetings with shareholders and board members in India (5%). It should also be noted that [the] Beneficiary's duties also include domestic travel to explore business development

opportunities for Petitioner. For instance, [the] Beneficiary has made multiple trips to Los Angeles, California and San Diego, California in the past year to meet various store and showroom owners about potential collaborations.

With respect to the company's staffing levels, counsel submitted a revised organizational chart, in which the petitioner's handicrafts supervisor was identified as occupying the position of assistant manager, while the garments and jewelry supervisor was identified as occupying the position of supervisor. The individual originally noted as the company's office support was identified as the office manager/marketing, and as overseeing a receptionist/office clerk. The AAO notes that the changes made to the petitioner's staffing levels since the date of filing will not be considered in the analysis of the instant matter. Rather, the AAO will consider the staffing levels represented by the petitioner on the date of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) (requiring that a petitioner 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). While counsel also provided a brief description of each employee's job duties, it is unclear whether the descriptions represent the duties performed by the employees in their new positions, or whether the employees were performing these tasks at the time of filing. 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).

In her November 7, 2006 decision, the director concluded that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director acknowledged the job duties provided for the beneficiary's employment as president, and noted the petitioner's staffing levels as being comprised of two full-time and two part-time employees. The director stated: "The staffing levels are insufficient to allow the beneficiary to function primarily within the 'executive' or 'managerial' capacities as defined [in §§ 101(a)(44)(A) and (B) of the Act]." The director concluded that the subordinate employees would provide minimal assistance to the beneficiary in performing the daily functions of the United States business, and that the beneficiary would be primarily performing non-managerial and non-executive tasks. Consequently, the director denied the petition.

Counsel for the petitioner filed the instant appeal on December 8, 2006. In a December 6, 2006 appellate brief, counsel contends that the statement describing the beneficiary's job duties in conjunction with the allocation of the amount of time the beneficiary would spend performing each task undermine the director's finding that the beneficiary would not be primarily employed as a manager or executive. Counsel states that the offered evidence demonstrates that the beneficiary would spend her time performing two essential functions of the petitioner's business, and that "her schedule leaves no time for [the] Beneficiary to devote to the daily functions of the enterprise . . . ." Counsel contends that the beneficiary's two subordinate supervisors perform the duties associated with the functions managed by the beneficiary, and that the petitioner's office manager and office clerk perform the administrative and clerical functions. Counsel further emphasizes the petitioner's use of an accounting firm to perform its payroll and accounting functions, and stresses that technological advances also reduce the size of the staff necessary to perform the business' day-to-day functions. Counsel claims that in light of the tasks performed by the petitioner's employees and contracted workers, the company's reasonable needs would be met, thereby allowing the beneficiary to primarily manage the essential functions of the design and distribution of products.

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).

The petitioner has not offered clarification of the specific managerial or executive job duties to be performed by the beneficiary in the position of president. Based on the two job descriptions, the beneficiary would supervise subordinate employees, develop "strategic business plans," set revenue goals, obtain funding from the foreign entity and from financial institutions, hire and fire employees, determine the petitioner's business location, and meet with customers. Despite the director's request for specific managerial or executive job duties, the petitioner's response provided little more than the initially offered description of the beneficiary's role as president, except to indicate that the beneficiary would devote the largest amount of time to meeting with the company's current and potential clients, a task that is not considered to be managerial or executive in nature. *See* §§ 101(a)(44)(A) and (B) of the Act. The petitioner's claims as to formal and informal "meetings" held by the beneficiary with subordinate employees and the foreign entity's board of directors and her simultaneous travel to determine business locations are not sufficient to clearly identify or describe the specific tasks to be performed by the beneficiary. The brief statements do not clarify whether the beneficiary's employment would be primarily managerial or executive in nature. 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).

With respect to the petitioner's staffing levels, the petitioner has not demonstrated that the beneficiary's subordinates fit within the statutory or regulatory guidelines of a professional, managerial or supervisory employee. Pursuant to section 101(a)(44)(A) of the Act, "managerial capacity" includes the supervision and control "of other supervisory, professional, or managerial employees." As noted previously, the beneficiary's subordinates are not supervising any lower-level employees. Thus, the petitioner's claim that the beneficiary would supervise supervisory employees is undermined by the submitted organizational charts. 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)).

Further, in evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner has not clarified the job duties of either "supervisory" position in order to determine whether a baccalaureate degree is necessary to perform in each employee's respective position. The AAO recognizes the bachelor's degree earned by the petitioner's handicrafts supervisor in the field of art/general studio practice. However, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, as the record does not contain reliable job descriptions of the tasks to be performed by the handicrafts and garments and jewelry supervisors, the AAO cannot determine whether the petitioner has established that a bachelor's degree is actually necessary to perform in these positions, and consequently, whether the beneficiary's subordinates may be deemed professionals. Again, 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. at 165.

Nonetheless, the above finding is not conclusive. Pursuant to section 101(a)(44)(A) of the Act, a beneficiary may be deemed to be a manager based on her management of an essential function and functioning at the top of the petitioner's hierarchy. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function.

Here, the petitioner claimed that the beneficiary would manage both the product design and distributions functions. The petitioner, however, has not accounted for the performance of its distributions function, which the petitioner identified as "essential." In fact, other than mentioning that the handicrafts and garments and jewelry supervisors would formulate distribution strategies, the petitioner has not addressed its distribution function with specificity, especially considering the petitioner itself claims to be functioning as a distributor. For example, the petitioner has not identified its distributors, explained its sales function, or identified any workers who would perform the non-qualifying duties related to its distributions and sales functions. The AAO notes, in particular, the petitioner's lease agreement, which designates a portion of its leased premises as retail space. Similarly, except for the brief representations that the supervisors would create designs and research market trends, the record is devoid of evidence as to who is actually creating the products distributed by the petitioner. The limited evidence does not establish that the beneficiary is managing the distribution and design functions of the petitioning entity. Again, 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. at 165.

Moreover, the staffing levels do not corroborate the petitioner's claim that the beneficiary's subordinate employees would be performing the entire non-qualifying functions of the business. 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.

At the time of filing, the petitioner was a five-year-old company that employed the beneficiary, two full-time supervisors, and one part-time office clerk. As noted, since three of the four employees have supervisory titles, there is limited evidence that the petitioner employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. The beneficiary's job description suggests that the handicrafts and garments and jewelry supervisors would research market trends, create designs, and formulate distribution strategies, while the part-time office clerk would perform administrative and clerical work. These brief representations do not demonstrate that the petitioner's reasonable needs, which include the design, creation, distribution, inventory, and sale of jewelry, garments, and handicrafts, as well as any administrative and clerical functions not performed by the part-time office clerk, would be met through the employment of two full-time subordinate employees. The record does not demonstrate that the staffing levels maintained by the petitioner at the time of filing would be sufficient to support the beneficiary in a primarily managerial or executive capacity.

Counsel contends on appeal that taken as a whole, the previously offered job descriptions, the petitioner's support staff, including contracted workers, and "technological" advances demonstrate that the beneficiary would be performing in a primarily managerial or executive capacity. Counsel's claims, however, are not supported by independent evidence in the record. The AAO acknowledges the petitioner's use of an outside accountant for its accounting and payroll functions. However, the petitioner has not accounted for the performance of the remaining non-qualifying functions detailed previously. Moreover, counsel's blanket references to "technological advancements," without an explanation as to what advances he is referring or how they impact the performance of the petitioner's non-qualifying functions are not sufficient to establish the beneficiary's purported managerial or executive authority. 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).

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 Citizenship and Immigration Services (CIS) previously approved four 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. See 8 C.F.R. § 103.8(d). 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. The director is instructed to review the previous nonimmigrant approval for revocation pursuant to 8 C.F.R. § 214.2(i)(9)(iii).

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.