



U.S. Citizenship  
and Immigration  
Services

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invasion of personal privacy

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[Redacted]

FILE: [Redacted]  
EAC 04 040 50206

Office: VERMONT SERVICE CENTER

Date: SEP 24 2007

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)

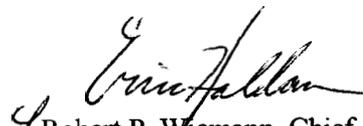
ON BEHALF OF PETITIONER:

[Redacted]

APR 15 2007

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, Vermont Service Center, denied the employment-based visa petition. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO).<sup>1</sup> Following a review of the record, the AAO concluded that the beneficiary was not eligible for the requested immigrant visa classification and dismissed the appeal. The matter is again before the AAO on a motion to reopen and reconsider. The AAO will grant the motion and affirm its prior decision. The petition will be denied.

The petitioner filed the 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 New York that represents itself on the Form I-140 as an importer and clothing retailer. On motion, counsel clarifies the petitioner's role in negotiating for the design, production and sale of down garments between American distributors and the production company in China. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not established that: (1) the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity; or (2) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Upon review of the appeal, the AAO withdrew the director's finding with respect to the beneficiary's employment in the foreign entity, but ultimately affirmed the denial of the petition based on the petitioner's failure to establish the beneficiary's proposed employment as a manager or executive of the United States entity. Specifically, the AAO noted that based on the job description offered by the petitioner, 70 percent of the beneficiary's job duties were either undefined or were non-qualifying. The AAO further observed the limited size of the staffing levels maintained by the petitioner at the time of filing.

On motion, counsel for the petitioner seeks to submit evidence to contest the AAO's "new" findings of ineligibility. Counsel contends that because of the risk and liability involved in the petitioner's contracts, the sales negotiations characterized by the AAO as "non-qualifying" are common to a multinational executive. Counsel also provides further detail of the day-to-day tasks related to the beneficiary's employment as president. Counsel submits a brief in support of the motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect

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<sup>1</sup> At the time of filing the appeal, Citizenship and Immigration Services (CIS) improperly determined that the Form I-290B lacked the proper signature from the petitioner, and, when the petitioner resubmitted a signed appeal, ultimately rejected it as untimely filed. Following several motions filed in response to the improper rejection, the AAO withdrew the director's decision rejecting the appeal and all subsequent responses to counsel's motions.

application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial 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 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.

In support of the instant motion, counsel for the petitioner submits a brief challenging the "new bases" upon which the AAO relied in its dismissal of the appeal. Specifically, counsel disputes the following findings by the AAO: (1) that the beneficiary's negotiation of sales contracts, which would consume 25 percent of his time, is considered non-qualifying; and (2) that the petitioner has not provided sufficient detail as to the purported managerial or executive tasks to be performed by the beneficiary during the other 50 percent of the beneficiary's time.

In her December 21, 2006 brief, counsel challenges the AAO's review of the beneficiary's employment, and emphasizes that a correct understanding of the petitioner's business is critical to the analysis of the beneficiary's employment capacity. Counsel states that rather than the AAO's interpretation of the petitioner as a clothes importer and retailer, the petitioner acts as "a link" between the China production factory and American wholesale distributors. Counsel explains that in this capacity, the petitioner negotiates with American distributors for the design, production, and sale of down garments, which will be produced by the beneficiary's foreign employer in China. Counsel states that the petitioner is, in effect, "a company who has the manufacturing capacity – through the company in China and its factories – to produce a custom garment in the chosen fabric and trim, in massive quantities for re-sale to wholesale distributors throughout the United States," thereby entailing greater complexity and liability than a sales contract involving only one store. Counsel instructs that in order to successfully negotiate these contracts, the beneficiary must be aware of the production capabilities and manufacturing schedules of the Chinese factories, particularly since the contact will bind Chinese factories to a specific production schedule. Counsel states: "[W]henver the Petitioner negotiates a sales contract the Beneficiary is binding, in effect, the parent company in China by reserving that

particular production space/time which will now be unavailable for other customers." Counsel emphasizes the importance of the beneficiary's role in personally negotiating sales contracts, stating:

Given the tremendous liability involved in negotiating a purchase order from an American wholesale distributor, [the petitioner] must ensure that the American customer has an excellent track record as a company that honors its obligations, that has the financial ability to pay for its orders, and that the company will not back out of a sales contract. Once the China factory has reserved that production time, once the China company has sourced fabric and other materials, once the China company has already legally bound its self to the purchase of garment materials and shipping contracts, any default on the contract by the American buyer can have devastating consequences. Therefore the sales negotiations, particularly the first contract with a particular American customer, are critical.

\* \* \*

[I]t is extremely important that the president of [the petitioning entity] undertake sales negotiations, especially those sales contracts which will represent a major undertaking by the China factories and those contracts which are first-time contracts with an American customer. After an American customer has honored all the terms of a previous year's contract, then the Petitioner may permit a salesman to re-negotiate another sales contract with a now-known customer. The American customer has proven its reliability and the critical eye of [the petitioner's] president may not be required for second and third year sales contracts. However, when negotiating with a company for the first time, or when the sales contract represents a tremendous exploitation of the China's company's factory, then the Petitioner's president must personally engage in sales negotiation due to the extremely high liability of the Petitioner company and the parent company in China. The amount of risk involved in certain sales contracts is too great to be left to commissioned salesmen.

As evidence of the importance of the beneficiary's participation in major or first-time sales negotiations, counsel references letters, submitted on motion, from two of the petitioner's American customers who also require that their presidents meet and negotiate with the president of its supplier. Counsel also notes that the job description of a "chief executive" as provided for on the Occupational Information Network (O\*NET), an online reference center sponsored by the United States Department of Labor, recognizes the tasks of negotiating and approving contracts and agreements with suppliers and distributors.

Counsel also discusses the remaining job duties previously provided by the petitioner, which included the following:

- Sales and contract negotiations with American buyers (10 hours per week)
- Meet with supervisory managers directly subordinate to the Beneficiary regarding meeting production demands, solving production problems in the China factory, and fulfilling sale terms (15 hours per week)
- Meet with 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 factory and other foreign suppliers (variable)

- Hire and fire supervisory managers (variable)
- Oversee and communicate with the Nanjing office of [the petitioner] (variable hours)

In the "expand[ed]" list of job duties submitted on motion, counsel specifically focuses on those related to the second and third job responsibilities listed in the above outline. As counsel's brief is already part of the record, the list will not be entirely repeated herein.

Upon review, the petitioner has not demonstrated on motion that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Consistent with counsel's claim on motion, the AAO recognizes that in certain circumstances, a beneficiary's role in negotiating sales contracts for the petitioner may be considered a qualifying managerial or executive task. In determining whether a beneficiary is performing primarily managerial or executive tasks, a clear distinction must be made between the routine day-to-day contracts or sales of the petitioning entity, which are not typically deemed to be managerial or executive in nature, and those contracts affording the beneficiary considerable discretion and involving significant consequences to the company. See §§ 101(a)(44)(A) and (B) of the Act. On motion, counsel makes a distinction between these contracts, stating that the liability involved in negotiating orders from American distributors and binding the Chinese factories to a particular production schedule demands the beneficiary's involvement in "major" or "first-time" contracts. The AAO agrees that according to counsel's claims on motion, the beneficiary's participation in negotiating major contracts that will bind the petitioner and foreign factories, and, in the event of a breach, will result in significant consequences to the companies, may be considered managerial or executive.

However, this responsibility accounts for only 25 percent of the beneficiary's time. As noted by the AAO in its October 24, 2006 decision, the manner in which the beneficiary would spend the remainder of his time remains vague and undefined. Although counsel provided on motion an additional list of job duties, which counsel contends clarifies that the beneficiary would spend an additional 63 percent of the beneficiary's time "performing the executive management of the company," case law does not require the AAO to consider this evidence that was previously requested and available, yet not supplied for review by the director or by the AAO.

A motion to reconsider contests the correctness of the original decision based on the previous factual record, while a motion to reopen seeks a new hearing based on new or previously unavailable evidence. *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006) (citing *Matter of Cerna*, 20 I&N Dec. 399, 402 n.2 (BIA 1991)). Here, counsel attempts to supplement the record with an additional description of the specific job duties related to two of the seven job responsibilities previously assigned to the beneficiary's role as president. On the Form I-290B submitted with the instant motion, counsel states that the evidence is being offered in response to a "new" finding by the AAO, to which the petitioner did not yet have an opportunity to respond. The AAO, however, rejects counsel's suggestion that the AAO dismissed the earlier appeal on a new finding.

Specifically, the director observed in her August 31, 2004 decision that the job duties of the beneficiary "are vague and do not specify exactly what duties the beneficiary will be performing which are bona fide as a manager or executive in the context of your current staffing arrangement." The AAO notes that prior to this finding, the director had notified the petitioner in a request for evidence that the record was not sufficient to establish the beneficiary's proposed employment in a primarily managerial or executive capacity, and had requested additional evidence, including "a detailed description of the beneficiary's proposed

executive/managerial duties . . . ." Counsel's response to the director's request for evidence included the list of the seven job duties outlined above, which, the AAO notes, is comprised of virtually the same job duties as those provided for the beneficiary's position as vice-president of the foreign entity. Following the director's decision, counsel neglected to explain on appeal the "vague" nature of the beneficiary's job duties or to provide additional evidence. In light of the two earlier opportunities provided to the petitioner to supplement the record with a more detailed job description, the AAO is not now obligated to accept additional evidence that was previously available to the petitioner, yet not submitted. The job description submitted on motion contains neither "new or previously unavailable evidence." *Matter of O-S-G-*, 24 I&N Dec. at 58.

In addition, the claims made in the motion to reopen with respect to the managerial or executive tasks performed by the beneficiary are not supported by affidavits. A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The declarations that have been provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The record also fails to corroborate counsel's additional claim on motion that the petitioner "has sufficient sales staff and administrative support to perform the actual daily tasks of providing down jackets and coats to American distributors in the wholesale markets." While the size of the petitioner's support staff is not the determining factor of the beneficiary's classification as a manager or executive, this factor is considered for the purpose of examining the petitioner's ability to relieve the beneficiary from having to perform non-qualifying tasks. 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. 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. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On motion, although counsel addressed two of the beneficiary's previously noted job responsibilities, she neglected to address the specific job duties related to four additional job responsibilities previously outlined in her July 6, 2004 response to the director's request for evidence. These job responsibilities included: planning for upcoming production; traveling to factories in China and to the sites of foreign suppliers; hiring and firing supervisory managers; and, overseeing and communicating with the petitioner's office in China. Other than indicating that the beneficiary would spend five hours per week planning upcoming production, counsel noted that the time devoted to performing the remaining job duties was "variable."

Based on these brief statements, it is not clear whether the beneficiary would be performing managerial or executive tasks in relation to these responsibilities, or whether the beneficiary would be relieved from the performance of any related non-qualifying tasks by subordinate employees. As explained by counsel in her October 21, 2004 letter, the petitioner's operations include "purchas[ing] fabric and accessories from textile

companies in the United States" and shipping the supplies to the factories in China. It is questionable, therefore, whether the beneficiary's role in planning for the company's upcoming production includes such non-qualifying tasks as contacting and negotiating with United States textile companies on a routine basis. The AAO notes that other than the representation that the company's production clerk would "[c]ontact delivery and source suppliers in China and Korea to arrange for overseas materials to be delivered to production sites," none of the beneficiary's subordinate employees were identified as participating in procuring the necessary materials. This is particularly relevant considering the production clerk appears to have been employed by the petitioner on a less than part-time basis at the time of filing.<sup>2</sup>

Similarly, as noted by the AAO in its October 24, 2006 decision, the record suggests that the petitioner's sales associate also occupied a part-time position at the time the petition was filed. Specifically, the AAO observed that despite counsel's claim that the petitioner paid to some of its employees commissions that were not included in the Internal Revenue Service (IRS) Forms W-2 or W-3, the record did not contain documentary evidence of the additional payments. On motion, as evidence of the claimed paid commissions, counsel submits copies of the petitioner's federal income tax returns for the tax years September 1, 2003 to August 31, 2004 and September 1, 2004 to August 31, 2005, and IRS Forms 1099, Miscellaneous Income, reflecting commissions paid to two individuals who had not been previously identified. The submitted evidence is not corroborative of the petitioner's claimed staffing levels. Nor do they demonstrate that the sales associate was employed on a full-time basis. Here, the part-time status of the production clerk and sales associate raises doubt as to whether the company's reasonable needs, including the sales and administrative functions specifically referenced by counsel, would be met through the services of its four-person full-time staff employed at the time of filing. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Similarly, counsel's suggestion that the petitioner "has the support of approximately ten people in China to handle certain problems on-site" is questionable, as this "support staff" was not specifically mentioned until the instant motion. Although the beneficiary was initially represented as *communicating* with the Chinese company, there is no evidence that the beneficiary's employment in the United States entity should be considered executive or managerial because he *oversees* the foreign company. Also, the beneficiary's purported managerial or executive authority over the foreign organization cannot be assumed from the company's organizational chart, which depicts the "China office" subordinate to the beneficiary. 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)).

Based on the foregoing discussion, the petitioner has failed to resolve on motion the inconsistencies related to the beneficiary's purported managerial or executive employment in the United States entity. Accordingly, the previous decision of the AAO is affirmed.

Finally, counsel takes note of the AAO's instruction that CIS' prior approval of an L-1A nonimmigrant visa petition filed by the petitioner for the benefit of the beneficiary does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Counsel suggests however, that the three prior

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<sup>2</sup> Based on the petitioner's 2003 fourth quarter wage report, the production clerk received \$1,200 in wages for employment during the months of October, November, and December.

approvals "were not erroneous and that the decisions were based upon valid fact and law." Counsel also observes that neither the director nor the AAO "suggested, implied or acted in any way to suggest that these three L-1A approvals were, in fact, erroneous."

The AAO emphasizes that 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). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). As the nonimmigrant proceeding is not combined with the record of the immigrant proceeding, CIS cannot be expected to differentiate the facts of the instant matter with those related to the nonimmigrant petitions.

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).

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 previous decisions of the director and the AAO will be affirmed and the petition will be denied.

**ORDER:** The AAO's October 24, 2006 decision is affirmed.