



U.S. Citizenship
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File: [REDACTED]
LIN 07 081 50045

Office: NEBRASKA SERVICE CENTER

Date: DEC 23 2008

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)

IN 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a New Jersey corporation and claims to be engaged in wholesale trade. It seeks to employ the beneficiary as its president 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 claims that it is the subsidiary of Lumian Garment Co., Ltd., located in the People's Republic of China.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel contends that the director disregarded, misread and misinterpreted the evidence submitted, and contends that the petitioner has submitted sufficient evidence to show that the beneficiary will be employed in a qualifying managerial and/or executive position.

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 issue in this matter is whether the petitioner has established that the beneficiary will 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), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily

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

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

The term “executive capacity” means an assignment within an organization in which the employee primarily

- (i) directs the management of the organization or a major component or function of the organization;

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

On Form I-140, filed on December 15, 2006, the petitioner indicated that the beneficiary would be employed as its president and general manager, and claimed that it currently employed eight persons. In a letter of support dated December 5, 2006, the petitioner provided the following overview of the beneficiary's duties:

Since last January of 2005, [the beneficiary] has served the duties of the President of the US entity with L-1A status, his employment status is qualified for the position of Multinational Managerial Alien Worker. As President of the US entity he has been the one who takes responsibility for overall administration of American Company, and his job duties have included organizing, supervising dept. managers and lower-level supervisors, making import decisions concerning business, personnel, management & administration, finance, etc., hiring and firing of company staff, examining & checking agreements & contracts and signing agreement & contracts, reading and listening to reports from dept. managers & lower-level supervisors, and writing comments, instructions upon these reports, analyzing financial papers and allocating funds, planning for company strategies, plans, schemes, and deciding company lines, etc.

In addition, the petitioner submitted a document entitled "Breakdown," which broke down the duties of the beneficiary by day. Specifically, the document stated:

Monday

1. Listen to reports made by trade officer, check the progress the supply department has made, and discuss the problems in organizing, planning and performing, if any. (Time devoted: 4 hours)
2. Read the financial reports (Time devoted: 2 hours)

Tuesday

1. Listen to reports made by officer of finance department, examine the progress the department has undergone, and search the points for improvements in the organization. (Time devoted: 5 hours, approximately)

2. Study the marketing reports. (Time devoted: 3 hours)

Wednesday

1. Give new instructions to the officer of trade department involved in working out new plans and targets and the way how to organize, schedule jobs, execute designs and realize them, and give criticism or encouragement. (Time devoted: 4 hours)
2. Check the financial policy. (Time devoted: 3 hours).

Thursday

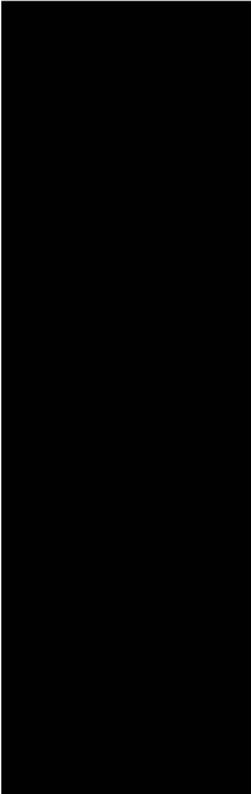
1. Issue orders and instructions to the officer of Adm. Department and financial department as to the goals, new policies, proposed schedules and the process to organize and carry out the work, coming with praise or discussions. (Time devoted: 5 hours)
2. Study the marketing reports and examines the marketing policies. (Time devoted: around 3 hours).

Friday

1. Study international trade materials and reports. (Time devoted: about 2 hours).
2. Consider the foreign trade progress. (Time devoted: around 1 hour).
3. Instructions made to the officer of trade department and finance department involved in foreign trade affairs according to the practical business items executed by the vary [sic] department. (Time devoted: 3 and half hours).
4. Review the overall business situation and check the general principle. (Time devoted: 1 hour).

The petitioner also submitted an organizational chart pertaining to the petitioning entity. The chart indicated that the beneficiary, as president, oversees the vice president, who in turn manages three managers: the international department manager, the financial department manager, and the marketing department manager. According to the chart, the international department manager oversees three clerks, the financial department manager oversees two accountants, and the marketing department manager oversees three sales/trade persons. The chart did not identify the names of the employees who filled these 12 positions. As noted above, the petitioner indicated on Form I-140 that it employs eight workers.

In addition, the petitioner submitted a document entitled "Personnel Structure & Recruitment," which named all employees and provided a brief description of their duties. Listed on this chart were the following employees:



- Vice President & CFO (Full-time)
- Officer, Trading Department (Full-time) *
- Officer, Finance/Accounting (Full-time)
- Adm. Dept. (Full-time) *
- Specialist & Officer (Full-time) *
- Accounting (Full-time)
- Accounting (Full-time) *
- Clerk (Full-time)
- Clerk (Part-time)
- Clerk (Part-time)

The petitioner also submitted copies of its Forms I-9, Employment Eligibility Verification, for the employees with a star (*) next to their name, above, as well as for three other persons not identified on the personnel chart, namely [REDACTED]

Finally, the petitioner submitted copies of its Form 941, Employer's Quarterly Federal Tax Return, and its New York Form NYS-45, Quarterly Combined Withholding, Wage Report and Unemployment Insurance Return, for the first, second and third quarters of 2006. For the first quarter of 2006, the state return indicated that the petitioner employed the beneficiary and [REDACTED]. The second quarter's return listed the petitioner's employees as the beneficiary, [REDACTED]. The third quarter's return identified four employees, namely, the beneficiary, [REDACTED].

The director found the initial evidence insufficient to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Consequently, a request for evidence was issued on September 14, 2007. In the request, the director required the petitioner to submit evidence establishing that the beneficiary satisfied the four criteria set forth in the regulatory definitions of either managerial or executive capacity, or both. The director indicated that in support of the beneficiary's eligibility, the petitioner should include copies of position descriptions, job titles, and specific duties for the beneficiary and all employees supervised, as well as their level of authority within the organization.

In a response dated October 16, 2007, the petitioner addressed the director's requests. Regarding the beneficiary's duties, the petitioner provided the following statement:

As the president of [the petitioner], [the beneficiary] directs the management of our company and makes major decisions for the company. He was also playing decision role to set up the goal and policy of our company. Beside the above his routine duty also includes:

1. Supervising the financial affairs, including company loans, payments, salaries and taxes.
2. Supervising the administration affairs, including administration affair and human resources including of making decision of hiring or terminating of company's employee.
3. Supervising managers of different department[s].
4. Issue the company's check.
5. [The beneficiary] only response to [sic].

The petitioner also submitted an updated breakdown of duties of the beneficiary. This breakdown is similar to the initial breakdown submitted in support of the petition. As a result, the AAO has highlighted in bold type below the statements that differ from the original submission.

Monday

1. Listen to reports made by trade officer, check the progress the supply department has made, and discuss the problems in organizing, planning and performing, if any. (Time devoted: 4 hours)
2. Read the financial reports (Time devoted: 2 hours)

Tuesday

1. Listen to reports made by officer of finance department, examine the progress the department has undergone, and search the points for improvements in the organization. (Time devoted: 5 hours, approximately)
2. Study the marketing reports. (Time devoted: 3 hours)

Wednesday

1. Give new instructions to the officer of trade department involved in working out new plans, **targets and ways of organization; scheduling jobs, realizing and executing designs, and giving criticism or encouragement.** (Time devoted: **about 4 hours**)

2. **Contact Chinese parent company and discuss plan check schedule of all projects.** (Time devoted: **about 3 hours**).

Thursday

1. Issue orders and instructions to the officer of the Administration Department and Financial Department as to the goals, new policies, proposed schedules and the process to organize and carry out the work, coming with praise or discussions. (Time devoted: 5 hours)
2. Study the marketing reports and examines the marketing policies. (Time devoted: around 3 hours).

Friday

1. Study international trade materials and reports. (Time devoted: about 2 hours).
2. Consider the foreign trade progress. (Time devoted: around 1 hour).
3. Instructions made to the officer of trade department and finance department involved in foreign trade affairs according to the practical business items executed by the vary [sic] department. (Time devoted: 3.5 hours)
4. **Weekly report meeting. Review the overall business situation and check the general principle.** (Time devoted: 1 hour).

On February 14, 2008, the director denied the petition. The director found that absent more specific evidence pertaining to the beneficiary and his interaction with the petitioner's eight claimed employees, the director could not determine that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director faulted the petitioner for failing to submit an organizational chart. The director concluded that based on this lack of evidence, USCIS was precluded from examining the organizational hierarchy of the petitioner, who claimed to have four departments.

On appeal, counsel for the petitioner submits a detailed brief in support of the petition. First, counsel points out that contrary to the director's findings, the petitioner did in fact submit an organizational chart and personnel overview with the initial petition and thus the petitioner's organizational hierarchy was well defined. Counsel continues by alleging that the director ignored and misconstrued relevant evidence, and that his findings were arbitrary and capricious. Finally, counsel alleges that the petitioner's staff has grown from eight to sixteen employees since the filing of the petition, thus evidencing the need for the beneficiary to occupy the managerial and executive position of president.

Preliminarily, the AAO will address the director's comments pertaining to the organizational chart. It appears from a review of the file in its entirety, and a review of the director's decision, that the organizational chart and personnel overview identified above were overlooked by the

director when reviewing the petition. The record indicates that prior to the request for evidence, however, the petitioner had in fact submitted these documents. The director's error is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Therefore, the director's comments with regard to the organizational chart and personnel structure of the petitioner are withdrawn.

Upon review of the record, however, the AAO concurs with the director's findings. 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 definitions of executive and managerial capacity each 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).

With the initial petition and in response to the request for evidence, the petitioner provided a day-to-day breakdown of the beneficiary's tasks during a typical work week. Despite the director's request for more definitive information in the request for evidence, the petitioner responded by submitting a breakdown that was virtually identical to the one submitted with the petition and already found to be deficient. Although the petitioner provided an overview of the beneficiary's duties in both the initial letter of support dated December 5, 2006, the statements provided in that letter are nondescript and merely paraphrase the regulatory definitions. Based upon the evidence submitted, it cannot be determined that the beneficiary would be primarily engaged in qualifying managerial and executive duties.

Specifically, in the initial letter of support, the letter in response to the request for evidence, and the two breakdowns of the beneficiary's weekly duties, the description provided simply adopts many of the key phrases used in the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. These general statements do little to clarify the exact nature of the beneficiary's duties. 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.). 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. For example, the petitioner claims that some of the beneficiary's duties include "making import[ant] decisions concerning business, personnel, management & administration, finance, etc.," "examining & checking agreements & contracts and signing agreement[s] & contracts," and "analyzing financial papers and allocating funds." These tasks are nonspecific and fail to specifically highlight the nature of the beneficiary's position in the company. Despite providing a day-to-day breakdown of tasks, 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. at 1108.

On appeal, counsel for the petitioner contends that the director's failure to consider the organizational chart and personnel structure of the petitioner prejudiced the petitioner and beneficiary, and claims that a review of the evidence submitted prior to adjudication shows that the petitioner has the organizational complexity to employ the beneficiary in a primarily managerial or executive position. The AAO disagrees.

The brief and vague overview of the beneficiary's role in the company, coupled with the unresolved issues surrounding the beneficiary's subordinate staff, precludes a determination that the beneficiary is relieved from responsibility for many of the day-to-day functions essential to the petitioner's business. While the AAO acknowledges that the director's failure to consider the organizational chart clearly impacted his denial of the petition, his ultimate conclusion was not erroneous.

The petitioner claims on Form I-140 to employ 8 persons. According to the organizational chart provided, which provides only position titles and no information regarding the employees who filled these positions, the beneficiary will supervise twelve positions, namely, the vice-president, three department managers, three clerks, two accountants, and three sales persons. However, the petitioner has failed to submit evidence establishing that these persons were actually employed by the petitioner at the time of filing.

The most recent evidence contained in the record are the petitioner's Forms 941 and NYS-45 for the quarter ending September 30, 2006. In that report, the petitioner claimed to employ the beneficiary and only three other persons: Le Chen, Accounting; Catherine Ding, Clerk; and Huiping Wu, Officer, Trading Department. The AAO notes that there is no position identified as "Officer, Trading Department" on the organizational chart submitted.

Therefore, despite the petitioner's contentions, it appears that the beneficiary only had three people working under him at the time of filing. There is no evidence that the petitioner employed any sales or marketing persons to assist in the petitioner's wholesale business or attend trade shows, and no administrative employees are identified, such as those who would provide secretarial services, answer phones, and perform general office tasks. The petitioner's claim that

it employed eight persons at the time of filing is not supported by documentary evidence. 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)).

The AAO notes that the record contains seven Forms I-9 were submitted as evidence of the petitioner's staff. These forms, however, must be accompanied by other evidence to show that these employees have commenced work activities. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. *See Matter of Ho*, 22 I&N Dec. 206, 212 (Assoc. Comm. 1998). In the absence of such evidence as pay stubs and payroll records, the petitioner has not established that the petitioner employs a subordinate staff that would relieve the beneficiary from performing non-qualifying duties.¹

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

In this matter, the AAO would normally look to the organizational structure of the petitioner to examine the duties of subordinate staff members in relation to the beneficiary. In this matter, however, the organizational hierarchy has not been clearly established in that the positions identified on the organizational chart do not correspond with the position titles of the people identified on the personnel structure. Moreover, the claimed organizational hierarchy is not fully staffed as contended by the petitioner; therefore, duties attributed to the beneficiary which involve interaction with the vice president and other managers cannot be verified since there is no evidence that the petitioner employs such persons. 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. at 591-92.

As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Although the petitioner provided an hourly breakdown of the petitioner's duties, most of these percentages included interaction by the beneficiary with

¹ The AAO notes that only one of these persons, Hui Ping Wu, appears on the petitioner's quarterly wage reports.

staff members not employed by the petitioner at the time of filing. Given the lack of clear and concise evidence, coupled with the unresolved inconsistencies regarding staffing as noted above, the record does not demonstrate that the beneficiary will function primarily as a manager and/or executive.

On appeal, counsel contends that the petitioner's business is prosperous and is expanding, and that its staff has grown to sixteen people. This contention, however, does not overcome the basis for the denial. Furthermore, 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).

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

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.