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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 2 9 2004

IN RE: Petitioner: [redacted]
Beneficiar[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, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in December 1994. It is a garment manufacturer. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors 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 director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief in response to the director's 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 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).

On appeal counsel contends: (1) immigrant visa law does not specify or ask for a detailed description of the beneficiary's services to be performed; (2) that a beneficiary's duties are the determining factor of executive capacity and that the beneficiary's duties may be general; (3) that the director improperly considered the size of the petitioner and failed to support his conclusion that the petitioner did not require the services of an executive; (4) that the director has attempted to overturn an approved L-1A, non-immigrant intracompany transferee petition; and (5) that a petitioner does not have to demonstrate organizational complexity but only demonstrate it has an executive or manager, a second layer supervisor, and a third layer staff. Counsel cites several unpublished decisions in support of her contentions.

Counsel's contentions and interpretation of the law and regulations are not persuasive. First, the regulation, as stated above at 8 C.F.R § 204.5(j)(5) requires the petitioner's offer of employment to "clearly describe the duties to be performed by the alien." The actual duties themselves 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).

Second, although a beneficiary's duties are the determining factor of executive or managerial capacity, such duties cannot be general. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava, supra.* 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, Id*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Third, 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* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, Citizenship and Immigration Services (CIS) must consider whether the record supports the detailed description of the beneficiary's duties. It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Fourth, it is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear 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).

Fifth, a petitioner must demonstrate that it employs or uses the services of a sufficient number of employees or independent contractors to relieve the beneficiary from performing primarily non-qualifying duties. The first-line supervision of non-professional employees is a non-qualifying duty. *See* section 101(a)(44)(A)(iv) of the Act. The petitioner may not create artificial layers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary's subordinates correspond to their placement in an organization's structural hierarchy.

Finally, counsel's citation to unpublished matters carries little probative value. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished matters. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

Upon review of the director's decision on the issue in this proceeding, the director has correctly concluded that the petitioner failed to establish 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), 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.

In a November 7, 2002 letter appended to the Form I-140, Immigrant Petition for Alien Worker, counsel for the petitioner indicated the beneficiary had been promoted to President and that her duties as president are:

(1) [F]ormulates the goals and policies of the corporation;
(2) [E]xercises discretion over the direction and development of the operation of the corporation by supervising the implementation of the personnel and administrative procedures of the corporation;
(3) [D]ecides the marketing strategies; negotiates major contracts;
(4) [R]esponsible for the hiring and firing decisions of all the employees.

Counsel added that the beneficiary had autonomous control over, and exercised wide latitude and discretionary decision making for the petitioner's successful management and direction. Counsel also provided the petitioner's structural hierarchy within the letter. The organizational chart depicted the beneficiary as president, and a vice-president/general manager immediately below her position. The chart also included four departments or positions immediately below the vice-president/general manager identified as executive assistant, purchasing/manufacturing manager, sales/marketing department, and accounting/finance department.

Counsel also provided brief descriptions of the beneficiary's subordinates' job duties. Counsel stated that: the vice-president/general manager directs operations, coordinates production, distribution, warehousing, and sales and also develops plans for use of materials, machines, and employees; the purchasing/ manufacturing manager directs and coordinates the purchasing, production and quality control operations, and also reviews market research and price analysis reports; the sales/marketing manager set sales targets; the executive assistant performs clerical duties and assists the president in preparing correspondence and arranging meetings and appointments; and, the accounting department oversees the financial status of the company.

On January 30, 2003 the director requested: (1) a copy of the petitioner's organizational chart including the current names of all executives, managers, supervisors, and number of employees within each department; (2) a brief description of job duties, educational level, date of employment and annual salary for each employee under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties including the approximate percentage of time the beneficiary spent in each of the duties; and (4) a specific day-to-day description of the beneficiary's duties for the previous six months.

In response to the request for evidence, counsel for the petitioner stated that the beneficiary had responsibility for overseeing employees, establishing the policies, principals, and procedures for all departments and delegating the power to her general manager to implement the policies and ensure that the production, distribution and sales are in accordance with her guidelines. Counsel noted that the beneficiary was also responsible for evaluating and reviewing information and plans provided by the general manager and had ultimate responsibility for how the company was run. The petitioner added that the beneficiary's current responsibilities are:

1. Be responsible to the Board of Directors of the Corporation; execute Board of Directors all [sic] resolutions, oversees the overall operation of the corporation and directs the U.S. corporation's operation;
2. Planning and developing for the U.S. corporation; Observe the laws and regulations of U.S. and the states; protect our U.S. corporation's rights; Developing long term and short term international policy;
3. Examine the Market Research Analysis Report and Pricing Report; Directing the marketing of the corporation;
4. Determine the demand for products and services offered by its parent company and the U.S. corporation's profits;
5. Examine the major contracts with major customers and participate in merger negotiations and make final decision on behalf of the corporation;
6. Hiring and firing the managerial employees. Determining promotion according to performances for key employees.
7. Oversees accounting department and approve annul [sic] budget;
8. Report business performances to the President of the parent company.

The petitioner provided a revised organizational chart showing the beneficiary as its president and a separate entity with the individual previously identified as the petitioner's general manager directly beneath the beneficiary's position. The chart also depicted quality control, product, and sales departments subordinate to the general manager's position. The petitioner indicated that: the general manager was in charge of running the petitioner's affiliate; the quality control department had two employees who monitored product quality and sample designs; the sales department had two employees who performed sales; and, the producing [sic] department had two employees who arranged production for high quality and large amounts of clothes.

The petitioner also provided its California Form DE-6 for the quarter in which the petition was filed. The California Form DE-6 confirmed the employment of the beneficiary, the general manager, a products

department employee, a salesperson, and a quality control employee. The California Form DE-6 also listed a part-time employee not identified on the revised organizational chart.

The director determined that the petitioner had not established its reasonable need for a manager or an executive because the petitioner conducted a manufacturing, wholesale, retail and international trade business, an industry that did not require professional employees. The director also determined that a company with eight employees did not possess the organizational complexity to warrant such an employee. The director inexplicably stated that the beneficiary would be involved with the day-to-day non-supervisory duties and would also be engaged in supervising the lowest level employees. The director concluded that the beneficiary would be acting in the capacity of a first-line supervisor and would be involved in the day-to-day operations of the business, precluding the beneficiary from fulfilling managerial/executive duties.

The AAO has addressed counsel's contentions on appeal above. However, to provide a more accurate analysis of the record, the AAO will address the inconsistent facts provided for the record and the law pertaining to establishing managerial or executive capacity.

The record contains several inconsistencies:

> The Form I-140 petition states that the petitioner employs 16 individuals. The revised organizational chart shows that the petitioner employs eight individuals, although one individual is responsible for overseeing a separate entity. The petitioner's California Form DE-6 shows that the petitioner employed six individuals when the petition was filed.
>
> The record provides inconsistent descriptions for the position of vice-president/general manager, the only individual between the beneficiary and the lower-level staff. The initial letter in support of the petition indicates generally that the vice-president/general manager directs operations, coordinates production, distribution, warehousing, and sales and also develops plans for use of materials, machines, and employees. The description in response to the director's request for evidence indicates that this individual is responsible for running a separate entity.
>
> The Form I-140 provides in its address that correspondence should be sent to the attention of [redacted] president, not to the beneficiary as president. The revised organizational chart shows that [redacted] is an employee in the sales department. Moreover, the petitioner's California Form DE-6 for the quarter in which the petition was filed shows that [redacted] received a salary of $7,500 while the beneficiary received a salary of $5,000.

These inconsistencies are material to the determination of whether the beneficiary is actually performing primarily the tasks associated with a manager or executive. 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). 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, Id.*

In addition to the inconsistencies contained in the record, the description of the beneficiary's duties does not demonstrate that the beneficiary will perform primarily managerial or executive duties. 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. *See* 8 C.F.R. § 204.5(j)(5). A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, counsel for the petitioner refers to the beneficiary both as an executive, and as a manager managing an essential function, supervisory employees, or managerial employees. Although the regulations do not preclude an individual from performing in both an executive and managerial capacity, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing a beneficiary is both an executive and a manager. The petitioner has not done so in this matter.

Moreover the petitioner's initial description of the beneficiary's duties primarily paraphrased portions of the definition of managerial and executive capacity. For example, the petitioner states that the beneficiary "[F]ormulates the goals and policies of the corporation," and "[E]xercises discretion over the direction and development of the operation of the corporation," and is "[R]esponsible for the hiring and firing decisions of all the employees." *See* section 101(a)(44)(A)(iii) and 101(a)(44)(B)(ii) and (iii) of the Act. As observed above, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra*; *Avyr Associates, Inc. v. Meissner, supra.*

In addition, the petitioner describes the beneficiary as deciding marketing strategy and negotiating contracts. When the beneficiary performs work to sell the product, including negotiating contracts, she is performing tasks necessary to provide a service or product. These duties will not be considered managerial or executive. The AAO cannot determine whether deciding marketing strategies is a task that relates to executive or managerial duties or whether it is primarily an operational task. However, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner does not significantly add to the specifics of the beneficiary's daily duties in response to the director's request for additional evidence. For example, the petitioner indicates that the beneficiary examines the market research reports and oversees the accounting department but does not clarify who performs the market research and prepares the reports or who conducts the accounting services. Thus, the record does not establish that the beneficiary actually manages or directs the marketing and accounting functions through others as required; instead CIS must conclude that it is the beneficiary who performs the marketing and accounting functions. As noted above, 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, supra.* If the beneficiary is indeed performing the marketing and accounting functions, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner's list of daily duties is more indicative of an individual directly supervising the petitioner's staff. For example, the petitioner indicates that the beneficiary visits the production line, discusses technical compliance and quality control problems, supervises the production process, and determines quantity of orders. The record does not support the petitioner's statement that the beneficiary meets with various department managers throughout the week to discuss schedules and production. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As observed above, the petitioner's California Form DE-6, coupled with the beneficiary's organizational chart, do not establish that the petitioner employs individuals in the position of manager or supervisor of its departments.

As determined above, a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Again, the petitioner has not submitted sufficient consistent job descriptions to conclude that the general manager, products department employee, salesperson, or quality control employee hold professional positions. 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). The petitioner has not provided evidence that any of these positions require advanced knowledge or learning, not merely skill, to perform the tasks associated with the position. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Counsel's concern on appeal that the director did not consider the beneficiary's function capacity is misplaced. If counsel claims that the beneficiary is directing or managing a function, the petitioner must identify the function with specificity, articulate the essential nature of the function, as well as establish the proportion of the beneficiary's daily duties attributed to directing or managing the function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages or directs the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages or directs a function.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence demonstrating that the beneficiary had been employed for the foreign entity in a managerial or executive capacity. Again, the petitioner provided a general description of the beneficiary's duties for the foreign entity. The record does not demonstrate that the beneficiary's foreign employment was primarily managerial or executive.

The petitioner also failed to establish its ability to pay the beneficiary the proffered wage of $26,400. The petitioner provided a copy of the beneficiary's 2000 Internal Revenue Service (IRS) Form W-2, Wage and

Tax Statement, showing the beneficiary received $19,000 in salary. The record includes the petitioner's 1999 IRS Form 1120, U.S. Corporation Income Tax Return, for the period of December 1, 1999 through November 31, 2001. It is not possible to determine from the evidence in the record that the petitioner could pay the beneficiary the proffered wage as of the petition's priority date that falls on November 20, 2002.

The petitioner has also presented confusing information relating to its qualifying relationship with the beneficiary's claimed foreign employer. The petitioner claims that it is a wholly owned subsidiary of the foreign entity. The petitioner submits a stock certificate issued to the foreign entity in the amount of 50,000 shares. However, the petitioner's IRS Forms 1120 consistently show that the foreign entity owns only 77 percent of the petitioner and at Schedule L, Line 22(b) that the stock is valued at $65,000. 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 290.

For these additional reasons, the petition will not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.