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FILE: WAC 03 195 52685 Office: CALIFORNIA SERVICE CENTER Date: AUG 22 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

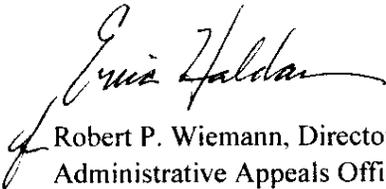
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Director
Administrative Appeals Office

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 April 2002. It is engaged in international trade. It seeks to employ the beneficiary as its general manager. 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 primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief.

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 proceeding is whether 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.

In a June 10, 2003 letter appended to the petition, the petitioner described the beneficiary's position in the United States as including the following duties:

1. Acting as primary link between the US Subsidiary and the parent company;
2. Formulating overall business policies and objectives of the Subsidiary while ensuring compliance with those of the parent company;
3. Playing a key role in all decision-making and business negotiations involving the Subsidiary;
4. Engaging in business development efforts to ensure the business growth of the Subsidiary;
5. Developing administrative guidelines and regulations for the Subsidiary;
6. Recruiting personnel for the Subsidiary in accordance with its Business Plan;
7. Developing human resource policies for the hiring, evaluation, training, and discharge of employees based on their performance; supervising the operation of various departments of the Subsidiary;
8. Supervising the work of subordinate employees;
9. Acting as authorized signatory for execution of contracts and/or documents;
10. Proposing innovative ideas and plans regarding the advancement and development of the company;
11. Directing the import and export affairs between the United States and China;
12. Maintaining close contact and liaison with clients, investors and vendors in both China and the U.S. which will enhance the business of the Subsidiary; and
13. Keeping the Subsidiary updated with regards to changes in the market conditions of international markets and/or any other factors affecting the international markets.

The petitioner also included its organizational chart showing the beneficiary as general manager, and a marketing executive and an import/export manager immediately subordinate to the beneficiary's position. The chart also listed two salespersons reporting to the marketing executive, an assistant in the import/export department, and a finance/administrative assistant reporting to the beneficiary in his role as administration and finance manager.

The petitioner included brief job descriptions for the beneficiary's subordinates. The petitioner indicated that:

The administrative assistant (also identified as the finance/administrative assistant) assisted the beneficiary in his role as administration and finance manager, with payroll, work schedules, answering phone calls, arranging staff and management meetings, and writing administrative reports;

The marketing executive established a U.S. sales network, reviewed reports, organized sales promotions, trade shows, supervised the sales representatives, prepared quotations for customers, provided customer service, organized new product development, directed product re-packing, and answered technical questions about electronic products;

The import/export manager managed and supervised import/export activities, reviewed purchasing and trade reports to determine purchasing activities, sought new sources and products, oversaw product inspection to check for quantity and quality;

The import/export assistant conducted inventory checks, assisted the "purchasing" manager with contacting suppliers, prepared invoices, labels, and shipping documents, inspected quantity of products waiting to be shipped, handled returned products, placed orders, liaised with shipping companies, arranged shipping insurance, contacted brokers and arranged import activities, and inspected product quality and quantity;

The sales representatives developed sales networks, answered phone calls, provided customer service, took customers' orders, assisted the sales manager with presentations at trade shows and exhibitions, delivered products, and conducted telemarketing to seek out potential customers; the out of state representative developed the sales network out of state.

The petitioner also included a California Form DE-6, Quarterly Wage and Withholding Report for the first quarter of 2003. The California Form DE-6 confirmed that the petitioner employed the beneficiary and individuals in the positions identified as finance/administrative assistant, marketing executive, import/export manager, and one of the sales representatives.

On July 16, 2004, the director requested: (1) a more detailed description of the beneficiary's duties in the United States, including the percentage of time the beneficiary spent in each of the listed duties; (2) a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, which should include the names of all executives, managers, supervisors, and number of employees within each department or subdivision, and a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision; and, (3) the petitioner's California Forms DE-6 for the last four quarters that were accepted by the State of California.

In an October 7, 2004 response to the director's request for further evidence in support of the petition, counsel for the petitioner indicated that the beneficiary was general manager of the petitioner and had taken on the following responsibilities and duties:

1. Acting as primary link between the US Subsidiary and the parent company for business and financial matters (such as contacting parent company via phone conferencing and fax regarding progress of US subsidiary and future plans of the US subsidiary and attending company general and extraordinary meetings in China at the premises of the parent company on behalf of the US subsidiary to ensure the US subsidiary's compliance with the overall business objectives of the parent company, discussing funding requirements of the US subsidiary with the parent company) (10%);
2. Formulating overall business policies and objectives of the Subsidiary, including overall business finance and credit policies while ensuring compliance with those of the parent company such as drafting company business plans regarding projected earnings and future expansion plans of the US Subsidiary (10%);

3. Playing a key role in all decision-making and business negotiations involving the Subsidiary such as financial decisions, business development of the North American market and type of products required by buyers and products available for sale by suppliers, making decisions regarding the need for branch offices in other cities [sic] (10%);
4. Engaging in business development efforts to ensure the business growth of the Subsidiary such as participation in trade shows and exhibitions to increase product awareness and marketing, and to seek investment opportunities (10%);
5. Developing administrative guidelines and regulations for the Subsidiary such as hiring policy; such as probation period for staff and how to evaluate the performance of the employees and also develop financial guidelines for the Subsidiary for investment decisions (5%);
6. Recruiting personnel for the Subsidiary in accordance with its Business Plan, in particular finance and accounting personnel and professionals; developing human resource policies for the hiring, evaluation, training, and discharge of employees based on their performance; supervising the operation of various departments of the Subsidiary such as import and export department and sales department; deciding how many employees to hire and how many employees for each department (5%);
7. Supervising the work of subordinate employees including professionals and managers of different departments to ensure satisfactory performance, for example, supervising preparation of financial statements, budget plans and credit policies, conducting managerial meetings to discuss each department's development and performance (5%);
8. Acting as authorized signatory for execution of contracts and/or documents such as major sales contracts and exhibition contracts (5%);
9. Proposing innovative ideas and plans regarding the advancement and development of the company; such as plans to hire market survey personnel to identify new interests in products and the evaluate the [sic] profitability of existing products (5%).
10. Directing the import and export affairs between the United States and China such as conducting meetings and contacting suppliers; evaluating the overall costs of freight and shipping, return of defective products via shipping; currency exchange issues; delay in shipments, etc. (10%);
11. Maintaining close contact and liaison with clients, investors and vendors in both China and the U.S. which will enhance the business of the Subsidiary; such as holding frequent meetings with clients, investors and vendors to keep up to date with their requirements and demands (10%); and
12. Keeping the Subsidiary updated with regards to changes in the market conditions of international markets and/or any other factors affecting the international markets such as pricing of products, competitiveness of the US Subsidiary's pricing policies, the emergence of new products, etc. (10%).

The petitioner noted further that the beneficiary directed the overall operations of the petitioner by utilizing his extensive knowledge of the electrical and electronic industries, and other skills. The petitioner also attached its California Forms DE-6 for the third and fourth quarter of 2003 and the first and second quarter of

2004.¹ The third quarter 2003 California Form DE-6, closest in time to the date the petition was filed, showed that the petitioner employed four individuals the first month of the quarter, six individuals the second month of the quarter, and nine individuals the third month of the quarter.

On November 5, 2004, the director determined that: (1) the description of the beneficiary's job duties was broad and general and did not provide sufficient detail regarding the beneficiary's actual duties and the percentage of time devoted to those duties; (2) some of the beneficiary's described duties "such as formulating overall business policies and objectives and engaging in business development have not been demonstrated to be managerial or executive responsibilities;" (3) the petitioner did not possess the organizational complexity to warrant an executive position; and (4) the record indicated that a preponderance of the beneficiary's duties would be directly providing the services of the business and not managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve him from performing non-qualifying duties. The director also noted that the petitioner's California Forms DE-6 for the third and fourth quarter of 2003 did not confirm the employment of the individuals listed on the petitioner's organizational chart. The director observed that discrepancies in the record regarding the petitioner's employees called into question the remaining evidence. The director denied the petition concluding that the record did not establish that the beneficiary had been or would be employed in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director had no basis to determine that duties such as "formulating overall business policies and objectives and engaging in business development" were not managerial or executive duties. Counsel also submits the petitioner's California Form DE-6 for the second quarter of 2003 which shows the employment of individuals in the positions of finance/administrative assistant, marketing executive, import/export manager, salesperson, and the beneficiary's position of general manager/finance and administrative manager. The California Form DE-6 also included two individuals not identified on the organizational chart. Counsel explains that the two individuals identified on the second quarter 2003 California Form DE-6 and not identified on the organizational chart had assumed the position(s) of import/export assistant. Counsel concludes that there was no serious discrepancy between the organizational chart and the pertinent California Form DE-6.

Counsel claims that the beneficiary was in fact managing and supervising professional, managerial, or supervisory staff and that there are sufficient subordinate staff to relieve the beneficiary from directly providing the services of the business. Counsel alleges that the petitioner is sufficiently complex to require hiring/firing of personnel, discretionary decision-making, and setting company goals and policies to constitute significant components of the duties performed on a day-to-day basis. Counsel contends that the beneficiary's job description is sufficiently detailed and that there is no regulatory requirement that a petitioner must provide the percentage of time devoted to each duty to obtain approval of a Form I-140 petition.

Counsel's assertions are not persuasive. The AAO notes preliminary, that although the appeal will be dismissed, the director's conclusory statement that some of the beneficiary's described duties "such as formulating overall business policies and objectives and engaging in business development have not been

¹ The petitioner did not include the most pertinent California Form DE-6 for the second quarter of 2003, the quarter in which the petition was filed.

demonstrated to be managerial or executive responsibilities" will be withdrawn. The AAO acknowledges that formulating business policies and objectives and developing a business are duties that may comprise an executive duty. In this matter, however, for the reasons discussed below, the record is not sufficient to establish that the beneficiary performs primarily managerial or executive duties.

Also preliminarily, the AAO observes that the director did not request the petitioner's California Form DE-6 for the second quarter of 2003. Instead the director asked for the petitioner's California Forms DE-6 for the four quarters prior to his July 16, 2004 request for evidence, which would have included California Forms DE-6 for the third and fourth quarter 2003 and the first and second quarter 2004. The petitioner complied with the director's request. As such the more pertinent California Form DE-6 submitted on appeal will be considered.

The petitioner has not submitted sufficient evidence to establish that the beneficiary's duties will be primarily managerial or executive. First, when examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In this matter the petitioner's initial iteration of the beneficiary's duties was overly broad, focusing primarily on the beneficiary's involvement in formulating or establishing policies. The petitioner's description was not comprehensive and did not convey an understanding of the beneficiary's daily duties. 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*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In response to the director's request for evidence, counsel for the petitioner expanded upon the petitioner's previous description by elaborating on the beneficiary's previously listed duties. However, upon review of the second iteration of the beneficiary's duties and the time the beneficiary spent on each of the duties, the petitioner has not established that the beneficiary performs primarily in a managerial or executive capacity.

The AAO acknowledges that the beneficiary's duties relating to the interaction between the petitioner and the parent company, establishing financial and credit policies and creating business plans, and playing a key role in decision-making and business negotiations regarding business development, as well as developing administrative guidelines and regulations could be considered managerial or executive duties. The record suggests that the petitioner's stage of development could require the beneficiary's involvement in these activities in a managerial or executive capacity intermittently, if not on a daily basis. However, the majority of the beneficiary's time, as allocated to the petitioner's numerous other operational, administrative, and supervisory requirements, is spent on non-qualifying duties.

For example, participating in trade shows, recruiting personnel and supervising subordinates, signing contracts, proposing ideas and marketing plans, contacting suppliers, evaluating costs of freight, handling shipping issues, contact with clients, investors and vendors to keep up to date with their requirements, and involvement with market research are all duties that suggest the beneficiary is primarily engaged in the daily operations of the business. These duties do not appear incidental to the beneficiary's daily duties. It is not possible to determine that the beneficiary's duties associated with these activities comprise primarily managerial or executive functions. 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 definitions of executive and managerial capacity 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). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Contrary to counsel's contention that there is no regulation requiring a percentage of time devoted to each of the beneficiary's duties, CIS must determine that the beneficiary is primarily engaged in a managerial or executive capacity. To make such a determination it is necessary to require a detailed description of the beneficiary's duties and the time the beneficiary devotes to those duties. It is especially relevant when several of the beneficiary's daily tasks, such as participating in trade shows, contacting suppliers, evaluating costs of freight, handling shipping issues, contact with clients, investors and vendors to keep up to date with their requirements, and involvement with market research do not fall directly under traditional managerial or executive duties as defined in the statute. See *e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO also observes that counsel on appeal claims that the beneficiary was in fact managing and supervising professional, managerial, or supervisory staff and that there are sufficient subordinate staff to relieve the beneficiary from directly providing the services of the business. However, the first and second iterations of the beneficiary's duties do not establish that the beneficiary's duties are supervisory. The beneficiary spends some time (10 to 15 percent) supervising subordinates or departments but the petitioner does not ascribe a significant portion of the beneficiary's time to this duty. Moreover, if the petitioner claims that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner has not supplied sufficient evidence to indicate that the beneficiary's subordinate employees are employed in positions that are primarily managerial, supervisory, or professional positions. 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)).

Counsel's claim that the petitioner employs sufficient personnel to relieve the beneficiary from performing primarily operational, administrative, and supervisory tasks is not persuasive. The AAO acknowledges that the petitioner claims to employ individuals who perform sales, marketing, and some import/export activities. However, the record does not establish that the beneficiary is relieved from performing the financial and administrative services of the petitioner, with the assistance of a clerk. The record also fails to show who performs the duties of a first-line supervisor overseeing the petitioner's employees, if not for the beneficiary.

Although counsel notes that the petitioner plans to add additional positions, a petitioner must be sufficiently established to support a managerial or executive position when it files the petition. 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).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the United States petitioner comprise primarily executive or managerial duties. For this reason, the petition will not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence to establish that the petitioner and the beneficiary's foreign employer enjoy a qualifying relationship. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. The petitioner claims to be a wholly-owned subsidiary of the foreign entity. The record contains a stock certificate issued to the foreign entity for 100,000 shares. The petitioner's June 10, 2003 letter submitted in support of the petition indicates that the issued stock is valued at \$1.00 per share. However, the petitioner's 2003 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, Schedule L, Line 22(b) indicates the value of the common stock issued is \$67,500. 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). For this additional reason 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.