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U.S. Citizenship
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FILE:

WAC 00 174 51573

Office: CALIFORNIA SERVICE CENTER

Date:

FEB 21 2006

IN RE:

Petitioner:

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]

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, initially approved the employment-based petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The petitioner submitted an appeal to the Administrative Appeals Office (AAO) and the AAO affirmed the director's decision. The petitioner subsequently submitted a motion to reopen and reconsider that was rejected by the AAO as untimely filed. Based on the evidence submitted the AAO will set aside its decision rejecting the motion and will consider the motion dated March 20, 2004. Counsel's motion will be dismissed.

The petitioner is a corporation organized in the State of California in December 1998. It imports, exports, and wholesales general merchandise. 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 petition was filed May 22, 2000 and was approved on September 12, 2000. Upon further review of the record and evidence submitted in conjunction with the beneficiary's Form I-485, Application to Register Permanent Resident or Adjust Status, the director issued a notice of intent to revoke approval on January 21, 2003. The director ultimately revoked approval on March 6, 2003, determining, among other things, that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the U.S. petitioner. The AAO affirmed the director's decision on this issue on February 20, 2004. The petitioner submitted a motion to reopen and reconsider the AAO's decision. The motion was dated March 20, 2004 but was date-stamped as received on March 31, 2004, more than 40 days after the AAO had rendered its decision. On February 7, 2005, the AAO rejected the motion as untimely filed, however, based on the evidence received, the AAO will set aside its rejection decision and will consider counsel's March 20, 2004 motion to reopen and reconsider.

On motion, counsel for the petitioner asserts that the petitioner is submitting additional evidence and arguments that establish the beneficiary's eligibility for this visa classification in an executive and managerial capacity. Counsel indicates that the new evidence consists of: (1) an expert opinion letter from Richard W. Sapp, Ph.D., Associate Dean for Academic Affairs and Director of International Programs at Portland State University who finds, that the president of the petitioner has been an executive in every sense of the word since the petitioner's inception; (2) additional payroll records and other evidence which shows that the petitioner has a stable payment schedule to the beneficiary, thus corroborating its organizational structure; (3) a new letter from the petitioner; and, (4) a new letter from the Chairman of the Board of petitioner's parent company.

Counsel clarifies the beneficiary's start date of employment for the petitioner and argues that the petitioner's payroll records substantiate the petitioner's organizational structure. Counsel contends that the AAO should accord some probative value to an expert who opines that: it is common business practice for small companies to have an executive; import/export activities in a small company are sufficiently complex to warrant an executive; the petitioner is justified in designating its senior employee as an executive; and, the petitioner's presidential position is truly an executive position. Counsel asserts that the AAO improperly focused on the beneficiary's marketing responsibilities and participation in designing the petitioner's computer

system to the exclusion of the other clearly described executive and managerial duties performed by the beneficiary as described in the record. Counsel notes that the petitioner's new March 18, 2004 letter submitted on motion shows that the petitioner has increased its goals and its staff as well as providing examples of decisions the beneficiary has made in the last six months. Counsel concludes that: "the record, as now constituted, establishes that the beneficiary is employed by the petitioner in an executive capacity."

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part: "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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. Furthermore, the regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

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 application of law or [Citizenship and Immigration Service (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.

The evidence submitted on motion cannot be considered new evidence nor are the assertions of counsel supported by pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law or policy. Accordingly, the motion will be dismissed.

For clarifying purposes only, AAO will address several of counsel's concerns, however of note, motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. In this matter as stated above, the petitioner has not provided new evidence and has not provided pertinent precedent decisions that would establish the AAO's decision was based on an incorrect application of law or policy.

The AAO acknowledges that its reference to the petitioner's unusual payroll structure has been clarified somewhat by counsel's information regarding the beneficiary's actual start date for the petitioner. However, the petitioner's failure to establish the beneficiary's eligibility for this visa classification rests not only on the petitioner's organizational structure but the descriptions of the beneficiary's and her subordinate employees' duties, as well as the failure to provide a clear understanding of the beneficiary's actual role in the business. 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).

Counsel argues on motion that the AAO improperly focused on the beneficiary's marketing responsibilities and participation in designing the petitioner's computer system to the exclusion of the other clearly described executive and managerial duties performed by the beneficiary as described in the record. However, the description of the beneficiary's duties in the record, for the most part, contained a generic description

paraphrasing elements of the definitions of managerial or executive capacity. As counsel references on motion, the record on appeal contained the following description of the beneficiary's duties:

The beneficiary is in charge of the day-to-day operations of the company. She is also charged with the development and implementation of general policies and systems concerning operations, finance and personnel management. The beneficiary is also charged with reporting to and interfacing with the parent company. The percentage of time spent in each area varies on a daily basis depending on current needs. The beneficiary's experience with the parent company in marketing, product and client development are the key factors in equipping her for the present position.

The beneficiary will be employed in the capacity of President in the U.S. entity in charge of the day-to-day operation and management of the company. To be more specific, the beneficiary will perform the following duties: formulate and enforce general policies, develop and implement operational, financial, and personnel management system, recruit, train, direct, and supervise employees, set up company business objective and business plan, direct and coordinate different departments' activities, report company's progress and financial position to the parent company on regular basis.

As a President, the beneficiary will exercise discretionary authority over company's financial matters such as budget, operational cost, fund management, etc. She will also be vested with power to handle personnel matters such as hiring and firing, evaluation, promotion, etc. The beneficiary will be chief executive officer of the company stationed in the U.S., accountable only to the board of directors of U.S. and the parent company.

In his [sic] position of President, [the beneficiary] will has [sic] wide latitude and discretionary decision-making authority in determining the most advantageous courses of action to take throughout the upcoming period of company expansion and development.

In addition, the beneficiary will engage in the following activities designed to strength [sic] the competitiveness of the petitioner:

- A. Directs the management of the marketing department of the U.S. entity. Has authority to hire, fire, promotion, [sic] leave authorization and other personnel actions.
- B. Establish the goals and policies of the marketing department, report to and communicate with the parent company; and coordinate with the parent company to attain goals of parent company.
- C. Exercise wide latitude in discretionary decision-making.
- D. Receive only general supervision or direction from president and board of directors.
- E. Participate in the plan[n]ing and designing of computer system to tailor the needs of the U.S. entity.
- F. Plan and design in-house training regarding knowledge of the products and services[.]
- G. Plan new ways of operation regarding quality control and sales methods.

H. Plan the expansion of the market.

In the above description, the petitioner paraphrases section 101(a)(44)(A)(iv) of the Act, three times; paraphrases or quotes section 101(a)(44)(A)(iii) of the Act three times; paraphrases or quotes section 101(a)(44)(B)(ii) of the Act three times; paraphrases or quotes section 101(a)(44)(B)(iii) of the Act three times; and paraphrases or quotes section 101(a)(44)(B)(iv) of the Act twice. In addition, the petitioner refers to the beneficiary's responsibility to report to the parent company on three different occasions. Although the petitioner's description of the beneficiary's duties is lengthy, it is also repetitive and does little to 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). Moreover, 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.

The limited amount of information that is outside a generic description of the beneficiary's duties relates to the beneficiary's "direct[ion] of the management of the marketing department;" "establish[ing] the goals and policies of the marketing department;" "participat[ion] in the plan[n]ing and designing of computer system to tailor the needs of the U.S. entity;" "plan[n]ing and design[ing] in-house training regarding knowledge of the products and services;" "plan[n]ing new ways of operations regarding quality control and sales methods;" and "plan[n]ing the expansion of the market." As the AAO referenced in its previous decision, the petitioner has not indicated that it has a marketing department nor has it indicated it employs individuals who carry out marketing duties, thus the reasonable conclusion is that the beneficiary will be performing the petitioner's marketing services. Marketing duties are not typically understood to comprise managerial or executive duties and 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). In addition, the petitioner did not specify, clarify, or otherwise explain who in its organization or outside parties would plan and design the petitioner's computer system. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, the beneficiary's tasks, such as designing in-house training, planning operations regarding quality control and sales methods, and planning the expansion of the market, do not fall directly under traditional qualifying duties or are too nebulous to be identified as primarily a managerial or executive function.

The record before the director and the AAO did not contain a comprehensive description of the beneficiary's duties resulting in the appropriate determination that the petitioner had not provided sufficient evidence to establish that the beneficiary's actual duties would comprise primarily managerial or executive duties. The petitioner 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.

The petitioner's March 18, 2004 letter submitted on motion does not address the beneficiary's duties when the petition was filed, but instead provides information regarding the beneficiary's decision-making in the six months prior to filing the motion. As the AAO previously observed, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's submission of an advisory opinion does not assist in determining that the beneficiary in this matter will perform primarily managerial or executive duties for the petitioner. Counsel's expert in this matter provides a conclusory opinion and does not address the deficiencies in the record regarding the petitioner's description of the beneficiary's daily duties. The AAO may, in its discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this matter the statement provided by Doctor Richard W. Sapp does not provide new evidence and is not sufficient to establish the beneficiary's claimed managerial or executive capacity. Likewise, the letter submitted by the petitioner's parent company does not address the deficiencies in the record regarding the description of the beneficiary's duties.

Counsel's claim that: "the record, as now constituted, establishes that the beneficiary is employed by the petitioner in an executive capacity" is not persuasive. First, as initially stated, the petitioner has not provided new evidence or pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law or policy; thus the motion does not meet the requirements for a motion to reopen or reconsider. Second, although the AAO could have better explained the deficiencies of the beneficiary's position description, the record submitted on appeal did not support a conclusion that the beneficiary's duties would comprise primarily managerial or executive duties.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.