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**U.S. Citizenship
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Services**

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File: [REDACTED]
SRC 04 204 50462

Office: TEXAS SERVICE CENTER Date: **MAY 08 2006**

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.

A handwritten signature in cursive ink, appearing to read "Robert P. Wiemann".
Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a limited liability company organized in the State of Florida in November 2000. It imports and exports electronic and telecommunication equipment and products and distributes floor mats and printer cartridges. It seeks to employ the beneficiary as its president and 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 denied the petition on March 2, 2005 and subsequently denied motions to reopen and reconsider on April 15, 2005 and June 14, 2005. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the U.S. petitioner.

On appeal, counsel submits a brief and re-submits documents already in the file.

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 petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the U.S. 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 July 14, 2004 letter appended to the petition, the beneficiary on behalf of the petitioner stated:

Since the approval of my L-1 visa, I have been responsible for managing the entire US organization, including the administrative and financial [sic] of the U.S. entity and have had the discretion over all operating decisions for the company. I manage the organization's goals and performance objectives, and other essential functions of the business. Parts [sic] of my functions include negotiating contracts on behalf of the company, and dealing with the U.S. Company's suppliers and vendors.

As President/General Manager, I am also responsible to evaluate and review the services provided by the company, to ensure it meets proper specifications as per customer and the products. Further, I am responsible to ensure conformity with company standards. I am also responsible for selecting, hiring and training the personnel. I am responsible for maintaining regular communication with the foreign parent company. Additionally, I handle all personnel decisions for the US entity. I have the responsibility for orienting and do the jobs descriptions of the personnel, training, retaining, [sic] dismissing and placing all of [the petitioner's] employees within the United States as necessary, as well as overseeing lower level management.

Counsel for the petitioner in a separate letter also dated July 14, 2005 indicated that the beneficiary was responsible for all of the administrative decisions of the company, for all marketing and sales activities of the U.S. entity, and for the overall performance of the company. Counsel noted that the beneficiary had discretion over all full-time, long-term personnel decisions, negotiated contracts on behalf of the company, and dealt with distributors, suppliers, and shippers. Counsel further indicated that the beneficiary oversaw an assistant, three sales representatives, and an individual doing business as a freight forwarding company. Counsel allocated the percentage of time the beneficiary spent on his duties as:

- (5%) Networking with business industries in community to identify and cultivate new information sources.
- (10%) Communicate with various suppliers, distributors, clients, and potential clients, related to electronic and telecommunications equipment and products.
- (10%) Preparation of budget for the US entity.
- (10%) Plot strategies for the expansion of business, contracts and negotiations, and develop financial objectives
- (10%) Maintain regular communication with the foreign parent company.
- (55%) Monitor the activities of all employees, including the Assistant, Three Sales Representatives, and [REDACTED] M., d/b/a/ CARIMAR, the freight forwarding company of the U.S. entity, and hiring of new employees. Manage the overall activities of the company; handle and/or supervise the administration and finances of the company. Evaluate and review the services ultimately provided by the company to ensure it meets proper specifications as per customer, and the products to ensure conformity with standards.

On January 26, 2005, the director issued a notice of intent to deny the petition. The director requested the number of the petitioner's employees when the petition was filed, Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements for 2004, IRS Forms 1099, Miscellaneous Income for 2004, and IRS Forms 941, Quarterly Tax Report, for 2004, and a copy of the petitioner's corporate tax return for 2003.

In a February 10, 2005 response, counsel for the petitioner provided among other things: (1) copies of sales agreements the petitioner had entered into with three individuals to sell the petitioner's products; (2) IRS Forms 1099 issued to the three sales representatives in the amounts of \$9,645.65, \$5,938.31, and \$7,809.10; the petitioner's Florida Form UCT-6, Employer's Quarterly Report, for the third quarter of 2004, the quarter in which the petition was filed, showing that the petitioner had paid the individual in the position of "assistant" \$1,440; a letter from a licensed freight forwarder that indicated the freight forwarding company took instructions from the beneficiary concerning the services provided; and copies of solicitation letters sent by the beneficiary to other companies expressing a desire to represent or sell their products.

The record also contains the petitioner's organizational chart showing the beneficiary as the direct report for the assistant, the three sales representatives identified as sales managers, and an accountant, a freight forwarder, and law offices. The record also contains the petitioner's payroll chart showing the monies paid to the beneficiary, the assistant, and the three sales representatives for each month in 2004. The payroll chart showed that the assistant was paid \$720 each month for her part-time employment, the export sales representative was paid a total of \$5,938.31 for six out of twelve months of work, the Dade County sales representative was paid a total of \$9,645.65 for ten out of twelve months of work, and the Broward County sales representative was paid a total of \$7,809.10 for ten out of twelve months of work.

The director denied the petition on March 2, 2005, determining that the beneficiary was the only full-time employee; the salaries of the other employees indicated that they were employed part-time; and that the record did not demonstrate that there were a sufficient number of employees who would relieve the beneficiary from performing non-qualifying duties. The director concluded that the beneficiary would perform a wide range of daily functions associated with running a business and that these duties are unrelated to the definitions of manager or executive.

In an April 1, 2005 motion to reopen counsel referenced the documentation previously submitted, cited an unpublished decision and a district court decision to stand for the proposition that the size of a petitioner and the number of employees supervised does not justify a denial when the beneficiary has been employed as the organization's top manager, and provided job summaries for each of the petitioner's employees. Counsel also alluded to the beneficiary's position as a position managing functions. Counsel restated portions of the beneficiary's position description and added that the beneficiary: supervises personnel, supervises collecting and paying accounts, analyzes the management of inventories, establishes corporate policy and negotiates purchase/sales prices on behalf of the company. Counsel listed the duties of the beneficiary's subordinates as: the part-time assistant handles mail, monitors purchases and the work agenda, and gives support to the sales team; the sales representatives focus on sales and introducing products; and the export sales representative manages the export market.

On April 15, 2005, the director acknowledged counsel's arguments but determined that the petitioner had not provided sufficient evidence to establish that the beneficiary would be relieved from performing the non-qualifying day-to-day duties of the business.

Counsel submitted a second motion to reopen approximately May 13, 2005. Counsel proffered the same arguments adding only an explanation that the reason the petitioner's 2004 IRS Form shows that the petitioner sold \$152,390 and paid only \$23,393.06 in commissions is that the petitioner at times did not receive a full price on good sold but received only a commission.

On June 14, 2005 the director again acknowledged counsel's arguments but determined that the petitioner had not established that the independent contractors were full-time employees.

On appeal, counsel for the petitioner again cites an unpublished decision and a district court decision to stand for the proposition that the size of a petitioner and the number of employees supervised does not justify a denial when the beneficiary has been employed as the organization's top manager. Counsel cites the Immigration and Naturalization Service's (now Citizenship and Immigration Services) operations instructions 214.2(l)(5) as guidance for applying the definitions of managerial and executive capacity. Counsel asserts that the petitioner employed four full-time employees and one part-time employee, including the beneficiary, when the petition was filed. Counsel asserts that operating a small business with a small staff are not factors precluding consideration of the beneficiary's managerial or executive status. Counsel contends that if the beneficiary cannot be considered a manager or an executive then the beneficiary is a functional manager.

Counsel's assertions are not persuasive. 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). First, 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 petitioner may not claim that a beneficiary will 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 duties of the beneficiary's position satisfies each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner's first iteration of the beneficiary's duties borrows liberally from portions of the statutory definition of managerial capacity and does little to establish what the beneficiary will be doing on a daily basis. 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.). In addition, portions of counsel and the petitioner's initial descriptions include duties that traditionally are not considered managerial or executive duties. Duties such as negotiating contracts, dealing with suppliers, vendors, distributors, or shippers, and responsibility for all marketing and sales activities are not duties that necessarily comprise managerial or executive tasks. The beneficiary also alludes to performing some quality assurance tasks to ensure the petitioner's services meet customers' specifications. However, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily"

employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Further, counsel's allocation of the beneficiary's duties does not succeed in showing that the beneficiary's primary tasks are managerial or executive. Counsel allocates 55 percent of the beneficiary's time to monitoring the activities of the employees, managing the overall activities, handling and supervising the administration and finances of the company, and providing quality assurance. Neither counsel nor the petitioner has explained how the performance of these broadly-stated daily administrative and supervisory tasks elevates the beneficiary's position to a managerial or executive position. 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, counsel allocates an additional 25 percent of the beneficiary's time to networking, communicating with suppliers, distributors, clients and potential clients, and preparing the petitioner's budget. Again, these duties do not comprise managerial or executive tasks.

At most, the description of the beneficiary's duties, the organizational chart, and the beneficiary's subordinates duties portray the beneficiary's position as primarily a supervisory position over sales representatives and an office clerk, along with responsibility for the routine administrative and operational tasks involved in coordinating the import, export, and sale of various products. Although the beneficiary is not required to supervise personnel, if it is claimed that his 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 record does not provide evidence that the positions of the beneficiary's subordinate sale representatives, office clerk, or freight forwarder required individuals with professional credentials, rather than individuals who could perform the sales, administrative, and clerical tasks of an import, export, and distribution company. 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 contention that the description of the beneficiary's duties established the beneficiary's position as a functional manager is also not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See section 101(a)(44)(A)(ii) of the Act*, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. Again, 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church*

Scientology International, 19 I&N Dec. at 604. In this matter the majority of the beneficiary's duties relate to supervising non-professional, non-managerial, and non-supervisory subordinates as well as performing administrative and operational functions related to the sale, import, export, and distribution of products. The description of the beneficiary's duties does not establish that the beneficiary is primarily managing or directing a function.

Counsel's assertions and references to other decisions are not persuasive. Counsel's citation to unpublished matters carries little probative value. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Upon review of the record in this matter the petitioner has not established that the beneficiary's duties and those of his claimed subordinates elevate the beneficiary's position to a primarily managerial or executive position. Further, counsel should take note that unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

Counsel's citation to a district court decision is noted. However, counsel alludes to but does not fully discuss the district court's decision that refers to the requirement that 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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Moreover, 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). In addition, the petitioner is required to specifically articulate why its needs are reasonable in light of its overall purpose and stage of development to establish that the reasonable needs of the organization justify the beneficiary's performance of non-managerial or non-executive duties. Even then the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

In this matter, the petitioner has not provided evidence that it has attained the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the beneficiary's duties performed on a day-to-day basis. Although the beneficiary's position is the highest in this organization, the AAO declines to extend the definition of "managerial capacity" to include a beneficiary whose duties comprise primarily the duties of: (1) a first-line supervisor of non-professional employees; and (2) the routine non-qualifying duties of an individual performing operational and administrative tasks coordinating the petitioner's import, export, and distribution business. The petitioner has not established that the beneficiary's duties elevate the beneficiary's position to a primarily managerial position. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Although neither counsel nor the petitioner specifically claim that the beneficiary's position is an executive position, the AAO observes that the beneficiary's position cannot be considered primarily executive. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. As observed above, the beneficiary's subordinates are not managerial employees. Counsel for the petitioner indicates that the beneficiary's subordinates sell the petitioner's products and provide the office's clerical services. These duties are not managerial. Again, the petitioner does not employ a sufficient number of individuals to relieve the beneficiary from performing first-line supervisory duties of non-professional employees and the daily administrative and operational tasks associated with running an import, export, and distribution enterprise.

The petitioner has not established that the beneficiary's position with the United States entity will be primarily managerial or executive. For this reason, the petition will not be approved.

Counsel also references the previous approvals of L-1A intracompany transferee petitions filed by the petitioner on behalf of this beneficiary. The AAO acknowledges that CIS approved other petitions that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, the AAO acknowledges that both the immigrant and nonimmigrant visa classifications rely on the same definitions of managerial and executive capacity. *See §§ 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).* Although the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. There are significant differences between the nonimmigrant visa classification, which allows an alien to enter the United States temporarily for no more than seven years, and an immigrant visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. Cf. §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, many Form I-140 immigrant petitions are denied after CIS approves prior nonimmigrant Form I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS, 293 F. Supp. 2d 25 (D.D.C. 2003); IKEA US v. US Dept. of Justice, 48 F. Supp. 2d 22 (D.D.C. 1999); Fedin Brothers Co. Ltd. v. Sava, 724 F. Supp. 1103 (E.D.N.Y. 1989).* Because CIS spends less time reviewing Form I-129 nonimmigrant petitions than Form I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS, 293 F. Supp. 2d at 29-30; see also 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).*

Moreover each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. *See* 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii). The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same information contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Further, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that as the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

The petition will be denied for the above stated reason. 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.