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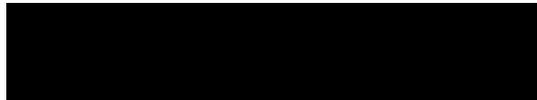
Office: VERMONT SERVICE CENTER

Date: AUG 22 2005

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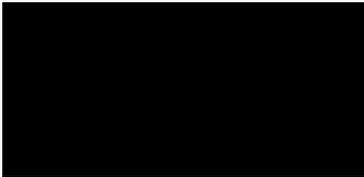
Petitioner:

Beneficiary:



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 script, appearing to read "Erica Valda".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 claims to have been established in the State of California in 1993 and subsequently to have moved its offices to the State of New York in February 1999. It provides legal services. It submitted a Form I-140, Immigrant Petition for Alien Worker, seeking to employ the beneficiary in a managerial or executive capacity 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 denied the petition, determining that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) erred in denying the petition to classify the beneficiary as an immigrant multinational executive and manager, because there is ample evidence demonstrating that the beneficiary has been serving as president of the petitioning company and performing executive and managerial duties.

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).

Preliminarily, the AAO acknowledges that the director denied the petition without requesting further evidence to clarify whether eligibility for the benefit sought had been established. *See* 8 C.F.R. § 103.2(b)(8). In the director's December 18, 2004 decision, the director observed that the documentation submitted in support of the petition showed that the petitioner intended to continue to employ the beneficiary in a specialized knowledge capacity. The director determined that the record did not contain evidence that the beneficiary would be involved with any managerial or executive type duties and responsibilities. The director noted that the record was complete and that the documents submitted did not establish that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner contends that a "request for further evidence would have been satisfied as there is ample documentary evidence demonstrating that the beneficiary has been and will be performing his duties in an executive or managerial position within the mandate of [the petitioner's] parent company." Counsel also asserts that the beneficiary has been serving in a dual capacity as company president and as an attorney with special knowledge of intellectual property laws since shortly after his arrival in the United States as an L-1B intracompany transferee with specialized knowledge. Counsel notes that the beneficiary arrived in the United States shortly after the tragedy of September 11, 2001 and that the destruction of the petitioner's offices and the company's president's departure required that the beneficiary occupy an executive position for the company. Counsel claims that the petitioner has been denied a fair opportunity to document the beneficiary's qualifications and that the director's summary decision is arbitrary and capricious without any reasonable justification in law or in fact.

The applicable regulation for this preliminary issue is at 8 C.F.R. § 103.2(b)(8). This regulation requires that the director request additional evidence in instances, "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility. Rather, the director denied the petition because of the petitioner's stated intent to continue to employ the beneficiary in a specialized knowledge capacity, a classification unavailable for an employment-based immigrant petition.

Moreover, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. The AAO will consider the totality of the evidence including the petitioner's evidence submitted on appeal.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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

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

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

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

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

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

On the Form I-140, Petition for Immigrant Worker, the petitioner checked the box in Part 2 indicating that it is seeking to employ the beneficiary in a managerial or executive capacity. However, in Part 6 of Form I-140, the petitioner indicated the beneficiary's job title as "Patent & Trademark Attorney and indicated he would be [s]erving as attorney for U.S. clients to handle patent and trademark matters." In the petitioner's September

15, 2003 letter appended to the petition, the petitioner references the beneficiary's current classification as an L-1B intracompany transferee and notes that the beneficiary has been working as a special attorney for the petitioner since June 2001. The petitioner also described the beneficiary's position as a specialized knowledge position, listing the beneficiary's duties as:

[P]roviding comprehensive information to United States entities regarding our company's activities and capabilities, as well as business opportunities and technology trade partners in China. He has advised various U.S. enterprises concerning their investment and trade strategy and goals in China, developing and implementing plans on behalf of American clients, and managing and overseeing the execution of investment, trade and other business in China on behalf of American clients.

The petitioner added that the beneficiary had been "playing a fundamental role in formulating and implementing corporate policies and procedures in accordance with [the parent company's] Patent and Trademark's unique corporate goals and plans in expanding our intellectual property practice in the United State [sic] – China trade." The petitioner also noted that the beneficiary as a permanent worker would continue to serve its clients' intellectual property needs and fulfill its corporate objective in the United States.

Finally, the petitioner indicated that:

[W]e strongly believe that [the beneficiary] qualifies as a permanent resident on account of his status as an L-1b [sic] intracompany transferee in a specialized knowledge capacity. We anticipate that with a permanent residency status, [the beneficiary] will travel freely between the United States [sic], China and around the world to undertake various assignments, attend international conferences and visit clients with ease.

On December 18, 2004, the director denied the petition determining that the record did not substantiate that the beneficiary would be employed in a primarily managerial or executive capacity for the U.S. petitioner.

On appeal, counsel for the petitioner attaches a list of exhibits and asserts that the attached documents show the beneficiary has occupied the executive position of president since shortly after his arrival in October 2001. On appeal, the petitioner describes the beneficiary's job duties as:

In his capacity of managerial and executive position, [the beneficiary] is responsible of [sic] paying visit to and receiving attorneys and clients from US law firms, companies and corporations, as well as individual client [sic] on behalf of [the petitioner and the parent company]; introducing the ability of [the petitioner] as well as [the parent company] to US clients and finding out the ability of US attorneys; negotiating terms of business agreement in assisting the client to achieve their goals in China, e.g. he is the decision maker as to the flexibility of [the petitioner and the parent company's] "Schedule of Charge" according to the number of patent and trademark applications and the quantity of other IP related matters entrusted from the client; and establishing business relationship and maintaining business contact with the clients. He represents [the petitioner] to attend the professional conferences,

such as INTA, AIPLA, LES US and Canada, NYIPLA etc. He also represents [the petitioner] and Patent and Trademark to negotiate the contracts with hotels or convention centers in holding reception and hospitality suite for [the parent company] during the INTA annual meeting.

[The beneficiary] is responsible for office operation, he represents [the petitioner] to negotiate and sign the office leasing agreement, choose and negotiate and sign contract with the office service providers, such as banking, office furnishings, telecommunication, insurances, subscriptions, office supply delivery, outsourcing, etc.

[The beneficiary] is responsible for recruiting and hiring personnel, and formulating and implementing all corporate policies, plans and procedures. He supervises all personnel in the office and reports to the President of [the parent company] on a regular basis.

[The beneficiary] came to this New York office [the petitioner] right after 9/11 terrorist attack to reestablish the office from scratch, after the former office was totally destroyed during the 9/11 tragedy. [The petitioner] used to have an office in Tower two [sic] of the World Trade Center. [The beneficiary] relocated and rebuilt the office, and reestablished contact with the clients and have [sic] been developing new clients since then.

The petitioner indicates that the beneficiary spends approximately 25 hours per week on managerial and executive matters, including:

10 hours on executive, corporate operations matters, such as seeking the opportunity to establish, develop and improve business relationship with US firms, companies and individuals, designing the strategy of procurement and enforcement of intellectual property right in China for clients, managing and overseeing the execution of investment and IP rights in China on behalf of the US clients; discussing with client about their project and IP rights in China on behalf of [the parent company]; 5 hours on accounting, banking, taxing matters and bookkeeping; 8 hours on consulting, visiting and receiving clients; and 2 hours on reports to [the parent company].

The petitioner states that the beneficiary spends 10 hours per week as a patent attorney and five hours per week supervising the work of all personnel in the office. Counsel also attaches copies of electronic mail addressed to the beneficiary as president concerning payment for services, contracts for conferences rooms and service agreements as well as a lease agreement signed by the beneficiary as president, agreements for the beneficiary to speak at seminars, and communications between the beneficiary and the petitioner's parent company.

Upon review of the totality of the evidence submitted in support of the petition, counsel's assertion that the beneficiary has been and will be employed in an executive or managerial capacity is 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). 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 beneficiary's duties comprising 25 hours of the beneficiary's time each week, although general, is more indicative of an individual providing the petitioner's day-to-day consulting, promotional, and operational services. For example, the petitioner indicated that the beneficiary spent 10 hours "seeking the opportunity to establish, develop and improve business relationship with US firms, companies and individuals, designing the strategy of procurement and enforcement of intellectual property right in China for clients, managing and overseeing the execution of investment and IP rights in China on behalf of the US clients; discussing with client about their project and IP rights in China on behalf of [the parent company]." This general description suggests that the beneficiary is the individual promoting the petitioner's legal services to others, providing research, advice, and understanding of Chinese law to the petitioner's clients. The petitioner also states that the beneficiary spends 8 hours per week "consulting, visiting, and receiving clients." These duties are not the duties of a manager or an executive but rather depict an individual providing the basic consulting and promotional services of the petitioner. 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's indication that the beneficiary spends five hours on accounting, banking, taxing matters and bookkeeping is vague and nonspecific. It is not possible to determine whether these duties relate to managerial or executive functions or are tasks associated with the day-to-day administrative tasks necessary to maintain the petitioner's operations. 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).

The petitioner acknowledges that the majority of the remaining portion of the beneficiary's time is spent as a patent attorney and a limited amount of time supervising another patent attorney. Again, this is time spent on providing the petitioner's actual services and is not primarily managerial or executive. The exhibits attached to the appeal also depict an individual involved in the day-to-day routine tasks of a liaison for the petitioner's parent company, an individual involved in marketing the petitioner's services through seminars, and an individual who provides research services for the petitioner's clients.

Typically, a petitioner must provide evidence that the beneficiary performs the high level responsibilities that are specified in the definitions as well as 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). In this matter the petitioner on appeal has attempted to enhance the beneficiary's job title and daily duties to include a managerial or executive aspect. However, a petitioner cannot offer a new position to the beneficiary, or *materially change a position's title*, its level of authority within the organizational hierarchy, or *the associated job responsibilities* (Emphasis added). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N

Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The information provided by the petitioner on appeal did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. The record does not substantiate that the beneficiary will be employed in a primarily managerial or executive capacity for the U.S. entity.

Of note, although the director did not request further evidence or make a determination on the beneficiary's employment for the foreign entity, the AAO finds that the record also fails to establish that the beneficiary's position for the foreign entity comprised primarily managerial or executive duties. However, as the petitioner has not been given an opportunity to address this issue, the AAO will note the deficiency and not discuss the issue further.

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.