

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



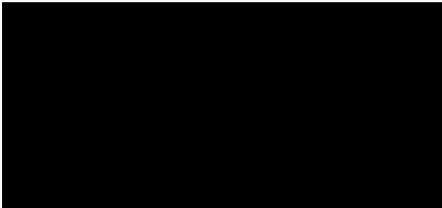
B4

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 31 2005
WAC 03 237 53454

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 July 1999. The petitioner exports automobile parts and equipment to China. 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 asserts that the beneficiary's duties clearly meet the criteria for both "manager" and "executive."

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 demonstrated that the beneficiary will be employed in a managerial or executive capacity for the U.S. petitioner.

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 an August 13, 2003 letter appended to the petition, the petitioner indicated:

As General Manager of the US company, [the beneficiary] has been responsible for the overall financial, administrative and business projects of the company. He has been formulating company business policies and directives for implementation by the department managers. He is directing the coordination among the company departments and the Chinese parent company. He directed the lower managers in the establishment and improvement of systematized marketing transactions with American distributors and suppliers. He also managed company officers to plan business objectives to increase sales volumes and products quality. In the process, [the beneficiary] also allocates responsibilities for the different company departments according to the company general business plan and parent company's directives. He supervises and evaluates performance of lower managers for compliance [with] company business policies and objectives. He reviews activity reports and business documents. Finally, he interviews and recruits corporate employees in accordance with the subsidiary's corporate needs.

The petitioner also indicated that the beneficiary directed the management of the petitioner, established the petitioner's goals and policies, exercised wide latitude in discretionary decision-making, and received only general supervision from the parent company.

The petitioner included an organizational chart showing the beneficiary in the position of general manager and chief financial officer. The chart also depicted an accounting clerk, sales and purchasing department manager, and a new business development manager immediately subordinate to the beneficiary. The chart further showed the same individual in the positions of corporate secretary and sales and purchasing clerk, as well as an additional sales and purchasing clerk. The chart noted that the organization also used an outside certified public accountant.

The petitioner provided brief job descriptions for the individuals named on the organizational chart. The petitioner indicated that the corporate secretary/sales and purchasing clerk assisted in corporate management, formulated corporate daily administrative policies, maintained the petitioner's records, prepared corporate correspondence and documents, conducted daily corporate marketing and purchasing operations, and promoted and marketed products to Chinese purchasers. The petitioner indicated that the sales and purchasing department manager managed corporate trade operations, formulated trading policies and procedures, oversaw and coordinated export and distribution transactions, supervised negotiation and conclusion of trading transactions, and networked with local American manufacturers, suppliers, trade associations, and international businesses. The petitioner claimed the new business development manager networked with customers and trade associations for new business opportunities to diversify current business activities, as well as, implemented corporate market development plans and promoted and marketed products to new Chinese customers.

The petitioner indicated that the accounting clerk provided daily record keeping, managed cash flow and assisted in producing financial reports and the second marketing and purchasing representative conducted

daily corporate marketing and purchasing operations and promoted and marketed products to Chinese purchasers.

On August 5, 2004, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: a more detailed description of the beneficiary's duties including a detailed "typical day" job description and the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the third and fourth quarters of 2003 and the first quarter of 2004.

On October 27, 2004, the petitioner provided its response. The petitioner noted that it had acquired a travel service as a second business. The petitioner restated the previous position description adding language to indicate that the beneficiary performed similar duties for the second business. The petitioner also provided information regarding the beneficiary's typical daily duties. The petitioner noted that the beneficiary: had morning meetings with company managers to instruct, resolve problems, determine cash flow, and reconcile financial transactions between the U.S. and Chinese companies; reviewed electronic mail to receive instructions from the Chinese company and resolve problems and read intracompany and industrial business and financial reports; made phone calls to key persons at major customers to discuss business performance and further foster and improve business relationships; read business journals; and, contacted the Chinese parent company and reported on the petitioner's daily work.

On December 6, 2004, the director denied the petition determining that: (1) the beneficiary's job description restated responsibilities listed in the definitions of managerial and executive capacity; (2) the petitioner's description of the beneficiary's typical day was vague and non-specific; (3) it was reasonable to believe that with the petitioner's organizational structure the beneficiary would be assisting with the day-to-day non-supervisory duties and that the performance of menial tasks precluded the beneficiary from being considered an executive; (4) the petitioner had not shown that the positions subordinate to the beneficiary's position were sufficiently complex to require a degree; and, (5) the petitioner had not provided evidence that the beneficiary would be primarily a function manager.

On appeal, counsel for the petitioner contends that the beneficiary's job description and the petitioner's organizational chart show that the beneficiary's duties are managerial and executive. Counsel asserts that the beneficiary manages employees in professional and managerial positions. Counsel notes that the petitioner's organizational chart shows three layers in the petitioner's managerial hierarchy. Counsel also references the director's failure to consider the petitioner's expansion into the travel service industry. Finally, counsel claims that the director's denial is an act of prejudice against smaller companies and a misinterpretation of the facts and a misapplication of the law.

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). 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).

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. In this matter the petitioner restates the criteria in the definition of "executive capacity" and states that the beneficiary fulfills the criteria. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 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.).

Further, in addition to reciting broadly cast business objectives, the initial job description suggests that the beneficiary's main responsibilities are coordinating, directing, and evaluating lower-level employees in their efforts to carry out the sales, promotion, purchase, and compliance with the petitioner's objectives. Although the petitioner consistently labels the beneficiary's subordinates, "managers" or "company officers," the job duties of the lower-level employees do not encompass managerial duties. Furthermore, the beneficiary's subordinates' duties do not comprise primarily supervisory tasks or tasks that traditionally are considered professional tasks.

For example, the petitioner indicates the corporate secretary assists in corporate management and formulation of corporate daily administrative policies and the sales and department manager manages corporate trade operations and formulates trade policies and procedures. These descriptions are not comprehensive and do not convey an understanding of the beneficiary's subordinates' actual duties. Specifics are clearly an important indication of whether 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. at 1103.

Moreover, AAO notes that the petitioner's description of the lower-level employees' job duties suggests that these individuals carry out the routine tasks necessary for the petitioner to operate. For example, the corporate secretary maintains records and prepares correspondence while also conducting marketing, purchasing, and promotion; the sales and purchasing manager coordinates export and distribution transactions, negotiates trading transactions, and networks with manufactures, suppliers, trade associations, and international businesses; the new business development manager searches for new business opportunities and plans, promotes, and markets products to Chinese customers, and the accounting clerk provides basic bookkeeping and administrative duties. These duties are indicative of individuals performing administrative, sales, promotion, buying, shipping, and market research. The petitioner has not provided evidence that these duties comprise primarily supervisory, managerial, or professional tasks. *See* section 101 (a)(44)(A)(ii) of the Act. 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)).

The AAO acknowledges that the beneficiary is not required to supervise personnel, however, in this matter the petitioner indicates that "directing" and "managing" lower-level personnel is a principal component of the beneficiary's job duties. The record does not support counsel's assertion that the beneficiary manages

employees in professional, managerial, or supervisory positions. Despite the petitioner's organizational chart's depiction of the sales and purchasing manager supervising or managing two sales and purchasing clerks, the petitioner's description of his duties suggests that the sales and purchasing manager is at most a senior member of the department. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the petitioner's purchase and export of automotive equipment to China. 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; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

In response to the director's request for evidence, the petitioner provided a vague description of the beneficiary's daily job duties. The petitioner indicated that the beneficiary spent his time: instructing his subordinates and resolving problems, again a duty more indicative of a supervisor; reviewing electronic mail and resolving problems; reading reports and business journals; and performing public relations work with key customers. Although some of the duties associated with these tasks could be considered managerial or executive tasks, the record is not sufficiently detailed to determine whether the beneficiary's daily tasks are primarily managerial or executive or whether the beneficiary is primarily performing routine tasks associated with the operation 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).

Counsel's note that the petitioner had acquired a travel service business since the petition had been filed is not probative. The director's failure to consider the petitioner's expansion into a second industry is proper. 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).

Counsel's claim that the director's denial is an act of prejudice against smaller companies is also not persuasive. The AAO acknowledges 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). However, it is appropriate for Citizenship and Immigration Services (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 or supervisory functions of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the record is insufficient to establish that the general manager primarily performs the high level responsibilities that are specified in the definitions and does not spend his time primarily supervising lower-level non-professional, non-managerial, and non-supervisory employees. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Beyond the decision of the director, the AAO questions the claimed qualifying relationship between the petitioner and the beneficiary's foreign employer. 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. See section 203(b)(1)(C) of the Act.

The director requested proof of the foreign entity's purchase of the petitioner's stock. In this matter, the petitioner claims that the beneficiary's foreign employer owns 60 percent of the petitioner's outstanding stock. The petitioner provided a copy of an October 28, 1999 wire transfer from Sichuan Sanhe Automotive Technique in the amount of \$30,000 to the petitioner's account. The beneficiary's foreign employer in this matter is Chengdu Sanhe Automotive Technique Co., Ltd. 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).

The petitioner has also provided a translated copy of a January 3, 2000 notice of import letter of credit payment/transfer that indicates "Sanhe Automobile Technique Co" transferred \$383,272.03 to the petitioner for the petitioner's investment and equipment purchase. The notice details the documents included with the sight draft as "3 invoices, 3 bills of lading, 3 packing lists." The petitioner also included a credit advice showing that \$302,279.94 of the \$383,272.03 was deposited to its account and that bank charges and \$80,378 was withheld for "transferee." The petitioner has not sufficiently clarified the nature of these transactions and whether the foreign entity is a purchaser of the petitioner's products or has actually invested in the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

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). For this additional reason, the petition will not be approved.

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.