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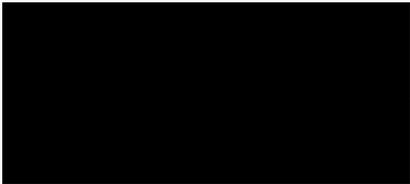
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2005
WAC 02 185 50461

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

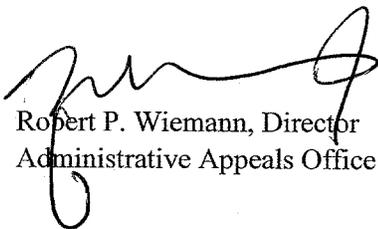
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 Nevada in March 2000. It is a mailbox and gift gallery. It seeks to employ the beneficiary as its executive 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: (1) a qualifying relationship with the beneficiary's foreign employer; or, (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner provides additional documentation to establish that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. Counsel asserts that the director erred as a matter of fact and law when determining the beneficiary was not a manager or an 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 first issue in this proceeding is whether the petitioner has established a qualifying relationship with 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 regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner initially did not submit evidence of its qualifying relationship with the beneficiary's foreign employer. The petitioner did submit its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for 2000 and 2001. Neither of the IRS Forms 1120 acknowledged that the petitioner was part of a subsidiary group or that a foreign person or entity owned at least a 25 percent interest in the petitioner. The IRS Forms 1120 on Schedule L, Line 22b noted that the petitioner's common stock was initially valued at \$3,200 in 2000 and valued at \$5,200 at the end of 2001.

On August 19, 2002, the director requested the foreign entity's list of owners and the stock ownership of the petitioner. In response, the petitioner stated that Smt. Neeru P. owned the foreign entity and that the beneficiary owned all the petitioner's outstanding stock.

On August 27, 2003, the director requested: (1) evidence to show that the foreign parent company had paid for its interest in the U.S. entity; (2) minutes of the petitioner's meeting listing the stock shareholders; (3) the petitioner's stock certificates, stock ledger, and articles of incorporation; and, (4) complete IRS Forms 1120 for the 2000, 2001, and 2002 years with all forms and statements attached.

In an October 1, 2003 response, the petitioner stated that: (1) Yamni Exports of New Delhi, India had paid the beneficiary \$5,000 to set up the petitioner as a subsidiary; (2) an individual had contributed an additional \$5,000; (3) the beneficiary was authorized to open a bank account in the petitioner's name with \$8,000 and a personal bank account with \$2,000; (4) in July 2000, relatives of the proprietor of the Indian company brought \$8,000 to the United States and \$4,500 was deposited with the bank; and, (5) the beneficiary "is the sole stockholder on account of Yamni Exports, India." The petitioner also provided two stock certificates showing that it had issued 1,000 shares to the beneficiary in December 2000 and 1,000 shares to the beneficiary in January 2001. The stock certificates did not indicate that the beneficiary held the shares in trust. The petitioner's minutes of meeting dated December 21, 2000 shows that the petitioner issued 1,000 shares to the beneficiary. The petitioner's minutes of meeting dated January 31, 2001 shows that the total number of shares issued is 2,000 and that the beneficiary held the 2,000 shares. The beneficiary submitted a declaration stating that he is the petitioner's sole stockholder and that he had no ownership interest in Yamni Exports and that the stocks had been purchased with funds provided by Yamni Exports. The petitioner's 2002 IRS Form 1120, again did not indicate that the petitioner was part of a subsidiary group or that a foreign person or entity owned a 25 percent interest. Schedule L, Line 22b of the 2002 IRS Form 1120, noted that the petitioner's common stock was valued at \$5,200 at the beginning of the year and \$10,423 at the end of the year.

The director observed the details noted above, and determined that the petitioner had not provided "unerring and concise evidence to substantiate the claim of qualifying foreign ownership of the U.S. entity." The director concluded that the petitioner had not established a subsidiary or affiliate relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner acknowledges that the petitioner's initial incorporation was made with the beneficiary as the sole incorporator and director. Counsel states that it was the express understanding between the parties that the petitioner would be a subsidiary of Yamni Exports. Counsel acknowledges that non-accredited service providers made mistakes on the petitioner's IRS Forms 1120 and submits amended Forms 1120 to rectify those errors. Counsel also submits voided share certificates 1 and 2 and outstanding share certificates 3, 4, and 5 issued to Yamni Exports in the amount of 1,257 shares on October 22, 2003, 1,000 shares on January 3, 2004, and 1,000 shares on January 9, 2004.

Counsel asserts that Yamni Exports has always controlled the petitioner through the beneficiary's services and that an affiliation clearly exists between the two companies sufficient to meet the needs of a qualifying organization. Counsel attaches a statement from an Indian advocate declaring that Yamni Exports books shows that the petitioner is its subsidiary. Counsel also submits emails generated between the foreign entity and the petitioner discussing business activities between the two companies.

Counsel's assertion is not persuasive. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control;

control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter when the petition was filed in May 2002, the beneficiary ostensibly owned 100 percent of the petitioner. The beneficiary reiterated that fact in response to the director's request for evidence. In addition, the petitioner provided no documentary evidence that the foreign entity purchased an interest in the petitioner. The record contains claims that the beneficiary was paid \$5,000 to set up the petitioner; that an individual, not the foreign entity contributed \$5,000 to the petitioner, and that the beneficiary was authorized to set up a bank account for the petitioner with \$8,000 and a personal bank account with \$2,000. The intermingling of funds along with the lack of documentary evidence substantiating that the foreign entity paid \$10,000 for an interest in the petitioner undercuts the foreign entity's claimed ownership and control of the petitioner.

Similarly, the amended tax returns and the share certificates issued to the foreign entity in October 22, 2003, January 3, 2004, and January 9, 2004 more than a year after the petition was filed raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Moreover, 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). 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 petitioner has not established that the foreign entity owned and controlled the petitioner when the petition was filed. Further, the petitioner has not provided evidence of the agreements allegedly entered into between the foreign entity and the beneficiary requiring the beneficiary to hold the petitioner's shares in trust. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not established a qualifying relationship with the beneficiary's foreign employer when the petition was filed. For this reason, this petition may not be approved.

The second 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 I-140, Immigrant Petition for Alien Worker, the petitioner indicated that it had one employee. The petitioner also stated that the beneficiary would handle the affairs of the firm, maintain liaison with buying agents and buyers, and develop new trade samples and accounts.

On August 19, 2002, the director requested: (1) the petitioner's line and block organizational chart as of the date of filing the petition showing all employees by name and job title and including a brief description of their job duties; (2) a more detailed description of the beneficiary's duties in the United States including an approximate percentage of time spent in each of the listed duties; and, (3) the petitioner's official California Forms DE-6, Employer's Quarterly Wage Report, for the last four quarters.

In an October 2, 2002 response, the petitioner indicated that the beneficiary was the petitioner's only employee and that the beneficiary "is fully responsible and in charge of sales/purchase, negotiations of orders, engaging people in the US." The petitioner also noted that the company engaged people on a commission or profit sharing basis who would take care of some of the sales. The petitioner referenced one such individual who "is handling the sales of oil paintings, portraits in trade shows, auctions, etc."

On August 27, 2003, the director again requested: (1) the petitioner's line and block organizational chart as of the date of filing the petition listing all employees under the beneficiary's supervision by name and job title and brief description of their job duties; (2) a more detailed description of the beneficiary's duties in the United States that included a typical day job description; and, (3) the petitioner's official state report of wages for 2002.

In an October 1, 2003 response, the petitioner again stated that the beneficiary was its sole employee and that he continued to be fully responsible for running the petitioner. The petitioner noted that the business was run out of its showroom located in Las Vegas. The petitioner repeated that it used the services of one individual to handle sales of oil paintings, portraits in trade shows, and auctions.

The petitioner also provided a list of the beneficiary's duties. The director provided the petitioner's statement in its entirety in his decision, thus the AAO will not repeat the description verbatim here. Briefly, the petitioner indicated that the beneficiary: managed and coordinated activities between U.S. and Asian markets; exercised authority in hiring, firing, training, delegating assignments, promotion, and remuneration; managed and directed all of the petitioner's development and business promotion activities; promoted standardization using its practices as a model and communicated the need for technological innovation; met with business and trade lobby groups; represented the petitioner in trade negotiations with prospective international buyers, developed new strategies, promoted standardization of logistical and customer support, exercised broad discretion over day-to-day operations, and oversaw international development; formulated and executed business policies pertaining to product procurement; represented the unique concerns and requirements of international operations to headquarters and provided contributions in the formulation of strategic product plans to ensure that policies are incorporated into business activities; and, in sum, has autonomous control over the business and exercises wide latitude and discretionary decision-making in establishing the most advantageous courses of action for international development activities.

The director determined that: (1) the beneficiary's job description did not establish that the beneficiary primarily performed in an executive capacity; (2) it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with the day-to-day non-supervisory duties; and, (3) the beneficiary would be performing routine operational duties rather than managing a function of the business. The director specifically observed that the petitioner's description of the beneficiary's job duties paraphrased elements of the statutory definitions for executive and managerial capacity and that performing menial tasks precluded the beneficiary from being considered an executive.

On appeal, counsel for the petitioner emphasizes that the beneficiary had previously been approved for an intracompany transferee L-1A classification. Counsel urges similar approval for an I-140 based on the similar requirements of the two classifications and for consistency and regularity. Counsel observes that prior to

IMMACT 90, the definitions of executive and managerial capacity excluded individuals who produce a petitioner's product or service. Counsel observes further that the current version of the Act omits this exclusion and the definitions of managerial and executive capacity include the management of a function and that a beneficiary need not directly manage other personnel. Counsel asserts that the petitioner's detailed description of the beneficiary's duties, the nature of the petitioner's import business, and common sense dictate that the beneficiary's functions are executive. Counsel also contends that the beneficiary is uniquely qualified in analyzing and interpreting the vision of the various Indian artists whose handicrafts, jewelries, and oil paintings, the petitioner imports and sells. Counsel claims that the beneficiary's qualification is essential in carrying out the petitioner's key process or function. Counsel concludes that the focus of this analysis must be the beneficiary's responsibility for policy decisions and oversight of all functions within the company.

Counsel's assertions are not persuasive. First, 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). It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant 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). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 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. Because CIS spends less time reviewing I-129 nonimmigrant petitions than 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(i)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Furthermore, 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).

Second, counsel observes that Congress omitted the language that discussed individuals who produce a product or provide a service from the Immigration Act of 1990 and asserts that this is a clear indicator that such individuals are not precluded from qualifying as multinational managers or executives. However, the AAO will not draw this conclusion based solely on an omission. Counsel does not acknowledge a preexisting precedent decision that specifically discussed individuals that are engaged in the production of a product or service. That precedent clearly states that an employee who primarily performs the tasks necessary to produce a product or to provide a service, rather than managerial or executive duties, 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).

Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel's unsupported assertions are not persuasive on this point.

Third, counsel's assertion that the description of the beneficiary's duties, the nature of the petitioner's import business, and common sense dictate that the beneficiary's functions are executive, is not persuasive. As the director observed, the petitioner paraphrased portions of the definitions of executive and managerial capacity in its description of the beneficiary's duties. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). In addition, counsel notes that the beneficiary is uniquely qualified in analyzing and interpreting the vision of the various Indian artists whose handicrafts, jewelries, and oil paintings, the petitioner imports and sells. This statement, coupled with the petitioner's indication that the beneficiary meets with business and trade lobby groups, represents the petitioner in trade negotiations with prospective international buyers, and executes business policies pertaining to product procurement, is indicative of an individual performing the petitioner's daily operational tasks of purchasing, marketing, and selling the petitioner's products. As noted above, 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 at 604.

Finally, counsel's claim that the beneficiary's qualifications are essential for the petitioner's function does not establish the beneficiary's managerial or executive capacity. If counsel claims that the beneficiary manages an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Similarly, if counsel claims that the beneficiary's oversight of policy decisions and all functions within the company demonstrate the beneficiary's executive capacity, the petitioner must identify the policies and functions with specificity and establish that the beneficiary's primary task relates to executive oversight rather than implementing or carrying out the policies and functions. In this matter the petitioner has provided a broad description of the beneficiary's duties, and the record does not provide evidence that the petitioner employs individuals or uses a sufficient number of independent contractors to carry out the petitioner's operational tasks. The petitioner has not established that it has sufficient personnel to relieve the beneficiary from performing primarily non-qualifying duties.

The petitioner has not provided evidence that the beneficiary's tasks comprise primarily managerial or executive duties as defined at section 101(a)(44)(A) and (B) of the Act. The petitioner has not presented evidence to overcome the director's decision on this issue.

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.