

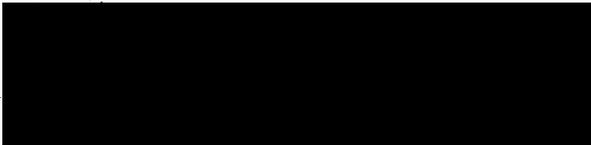
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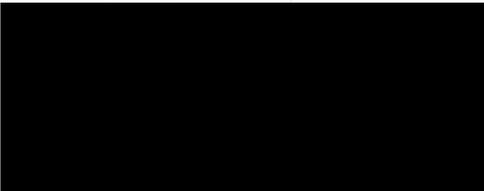


FILE: EAC 04 097 53386 Office: VERMONT SERVICE CENTER Date: JUL 11 2005

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, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the Vermont Service Center.

The petitioner claims it is a limited liability company organized in the State of New York in 1992. The petitioner elected S corporation classification in 1996. It provides international sales and marketing support services for textile and garment products manufactured in China. It seeks to employ the beneficiary as its vice-president of business development. 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 a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the director based her decision on the erroneous belief that the petitioner claimed to be a branch office of the foreign entity. Counsel asserts that the record demonstrates that the Chinese foreign entity is a branch office of the petitioner. Counsel also notes the previous approval of the beneficiary's classification as an L-1A intracompany transferee and requests that Citizenship and Immigration Services (CIS) prior determination be given deference. Finally, counsel contends that CIS failed to provide adequate notice of its intention to deny the Form I-140 petition on the issue of qualifying relationship. Counsel notes that the director did not request evidence on this issue in her May 25, 2004 request for further evidence.

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 a qualifying relationship between the petitioner and the foreign entity. 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.

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 record contains: (1) a translated copy of a Registration Certificate of the Permanent Office of Foreign Enterprise in China dated May 22, 2002 naming the foreign entity's head office as the United States petitioner; (2) a translated copy of a Tax Registration for Foreign Enterprises for an effective period beginning May 22, 2002 through May 16, 2005 showing that the petitioner is a foreign enterprise and the head office of the Chinese entity; (3) a translated copy of a Statistical Registration Certificate for an effective period October 9, 2002 to October 9, 2006 naming the Chinese entity as the Shanghai representative office of the petitioner; (4) a July 8, 2002 letter signed by the office managing partner of a [REDACTED] firm indicating that the Chinese entity is the petitioner's representative office in Shanghai; (5) a 2002 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for S Corporation indicating the petitioner was incorporated in March 1995, elected S corporation status in January 1996, had one shareholder, and was a

sales office; and (6) evidence that the petitioner had received operating funds from [REDACTED] Hong Kong entity, in February, April, May, and June 2004.

The director noted that: the foreign entity, [REDACTED] is a limited liability company based in Hong Kong with an office in Shanghai; the United States entity appears to be wholly owned by one individual, estate, or trust and therefore is a separate entity apart from the foreign entity and could not be considered a branch office for the purposes of this visa classification; and the record lacked evidence to show who in fact owns and controls the United States entity. The director determined that the United States employer and the foreign employer are separate business entities and that the record did not establish a qualifying relationship between the two entities.

On appeal, counsel for the petitioner indicates that the petitioner is an "S" corporation with one shareholder that operates a branch office in Shanghai, China. Counsel notes that this information was included in the letter submitted in support of the petition. Counsel also references the Registration Certificate of the Permanent Office of Foreign Enterprise in China dated May 22, 2002, the Tax Registration for Foreign Enterprises for an effective period beginning May 22, 2002 through May 16, 2005, the Statistical Registration Certificate for an effective period October 9, 2002 to October 9, 2006, and the July 8, 2002 letter signed by the office managing partner of a Shanghai law firm indicating that the Chinese entity is the petitioner's representative office in Shanghai, all previously submitted in support of the petition. Counsel asserts that the U.S. petitioner operates the foreign entity branch office in Shanghai and thus a qualifying relationship has been established.

Counsel's assertion is persuasive. The record in this matter contains sufficient evidence establishing that the beneficiary's foreign employer is the petitioner's branch office. The petitioner has established that the petitioner is the same employer as the petitioner's Shanghai office, where the beneficiary worked prior to entering the United States as a nonimmigrant. The director's decision of October 6, 2004 is withdrawn.

The AAO notes for the record, however, that with regard to the similarity of the eligibility criteria for Form I-140 petitions and Form I-129 L-1A petitions, 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). However, 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.

It must be noted that 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 L1-A 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). Finally, each petition is a separate record of proceeding and receives an independent review. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Because the approved nonimmigrant petitions are not part of the current immigrant visa record of proceeding, the AAO cannot determine whether the documentation supporting the previous L-1A petition was sufficient or whether the petition was approved in error.

Counsel should further note that 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. at 597.

Beyond the decision of the director, the petitioner has not 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.

Counsel for the petitioner asserts that the beneficiary is both a manager and an executive. However, 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 has not provided evidence of its staffing level in its New York office. The director specifically requested that the petitioner provides its IRS Form 941, Employer's Quarterly Tax Return for the first quarter of 2004, the quarter in which the petition was filed. However, the petitioner provided only its Form 941 for the first quarter of 2003. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner also provides two organizational charts. One organizational chart depicts the New York office on the same tier as the beneficiary's position as vice-president/general manager in the Shanghai office. On this organizational chart, the New York office shows a sales manager reporting directly to the president and a sales assistant, designer, and merchandiser in positions subordinate to the sales manager. A second organizational chart shows the beneficiary as executive vice-president of business development supervising the New York office sales manager, who in turn supervises two sales assistants. The chart also shows four additional positions, apparently occupied by employees stationed in China, directly under the beneficiary's supervision and an additional 41 foreign employees indirectly under the beneficiary's position. The petitioner notes that the beneficiary spends approximately 60 percent of his time "managing the development and training of the company's marketing and sales support staff worldwide in order to effectively implement business development strategies." However, since the petitioner only employs three sales personnel in the New York office, the necessity of the beneficiary's permanent position in the New York office is not readily apparent.

On this same issue, the petitioner indicates that the U.S. office is a sales office and was established to provide international sales and marketing support services for the textile and garment products manufactured by the Chinese entity. Further, that the beneficiary will be responsible for directing all of the sales and marketing functions of the New York office. The petitioner notes that the beneficiary will spend 30 percent of his time establishing marketing and sales goals, strategies, and policies designed to generate and develop new business

opportunities in the United States. However, the record does not provide evidence that individuals other than the beneficiary will carry out all the tasks associated with marketing the Chinese office's product. Further, since the beneficiary devotes only 30 percent of his time to this operational task, it is again not clear that this position requires the permanent presence of the beneficiary in the New York office to carry out this function.

The AAO notes that the petitioner provided evidence in response to the director's request on the issue of the beneficiary's managerial or executive position. However upon our review of the record, including the nature of the petitioner's business in New York, the general description of the beneficiary's position for the New York office, the staffing level of the New York office, and the two disparate organizational charts, the petitioner has not established that the beneficiary's position for the United States entity would be primarily managerial or executive. For this reason the petition will not be approved.

The director's decision will be withdrawn on the issue of qualifying relationship. However, the matter will be remanded to the director for further review of the beneficiary's managerial or executive capacity for the petitioner. The director shall render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. The director's decision will be certified to the AAO, if adverse to the petitioner, upon entry of a new decision.

ORDER: The director's decision of October 6, 2004, is withdrawn. The matter is remanded to the director for further action and consideration of the above discussion and the entry of new decision that, if adverse to the petitioner, will be certified to the AAO upon completion.