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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 26 2006

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IN RE: Petitioner:
Beneficiary:

[REDACTED]

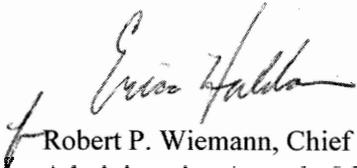
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

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, Chief
Administrative Appeals Office

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

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Texas that is operating a beauty shop. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel addresses portions of the record, which counsel acknowledges may have caused confusion in the director's review of the record. Counsel contends that despite the "confusing evidence," the beneficiary's proposed employment satisfies the statutory definitions of "managerial capacity" and "executive capacity."

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 or 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, which 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.

The issue in this proceeding is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the instant immigrant visa petition on September 2, 2004, noting the beneficiary's proposed employment as the president of its six-person company. In an appended letter, dated August 16, 2004, the petitioner provided the following job description:

In this capacity of president and Executive Director, [the beneficiary] is responsible for the overall direction and operation of the company. She is involved in all facets of the business, including new hires of the management staff strategy. She establishes our financial relations and is responsible for all tax and other required reports. She reports directly to our parent

company. She reviews business opportunities and is in charge of the company's expansion plans.

The petitioner submitted an organizational chart¹ identifying the beneficiary as president, as well as a subordinate staff consisting of the following positions: vice-president, manager, hair stylist, massage therapist, facialist, beautician, and manicure/pedicure specialist.

The director issued a request for evidence on May 16, 2005 asking that the petitioner provide evidence of its staffing levels, including the position titles, job duties, and educational levels of all employees, as well as Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for the years 1999 and 2000. The AAO notes that as the visa petition was filed in September 2004, it is unclear why the director requested IRS forms from four years prior to the filing.

Counsel for the petitioner responded in a letter dated August 10, 2005. In an attached letter, dated August 4, 2005, the petitioner noted the following job description for the beneficiary as president of the company:

Responsibilities include defining the objectives of the company and directing the overall operations of the U.S. [c]ompany; Recruiting and terminating managerial and subordinate employees where the need arises; Liasing [sic] with [g]eneral [m]anager to oversea [sic] the daily activities of the company; Responsible for initiating and implementing expansion plans for the company as well as establishing and maintaining budgets, meeting profitability levels, and ensuring the overall growth of the company.

The petitioner addressed the beneficiary's subordinate staff, noting the following positions, which vary slightly from those outlined above: general manager, beauty supply and gift shop assistant manager, beauty director/specialist, senior stylist, beauty therapist, and skin care specialist. The petitioner provided a brief description of the job duties performed by each employee. The petitioner also submitted copies of IRS Form W-2 issued to its employees in 2004.

¹ While the petitioner's organizational chart identifies three businesses that the beneficiary would direct – "Hena Beauty Spot," a gift and jewelry shop, and a construction and investments company – counsel states on appeal that the only business operated by the petitioner is the beauty salon. The record reveals, however, a lease agreement executed by the petitioner on April 25, 2003 to operate a gift and jewelry shop from three locations in the Houston Flea Market. The record also contains invoices reflecting sales made by the petitioner. The record undermines counsel's claim that the gift and jewelry shop is a "proposed venture" of the petitioner's. 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). If the petitioner was operating the business at the time of filing, it has not documented who would perform the related administrative functions of the business, particularly its sales. 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 director issued a decision dated August 26, 2005, in which she concluded that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted discrepancies in the staffing levels presented by the petitioner on its organizational chart and the employees identified on the Forms W-2 issued in 2004. The director noted that the inconsistencies in the record "do not present a clear picture of the U.S. company's overall operations," particularly with respect to those employees who would perform the administrative tasks of the business.² The director also stated that the petitioner "imposed that the executive position of president require a master's degree," and noted that the petitioner had not submitted evidence that the beneficiary completed a master's program. The director concluded that the beneficiary did not meet the petitioner's requirements for the proposed position. Consequently, the director denied the immigrant visa petition.

On appeal, counsel for the petitioner notes that at the time of filing, the petitioner employed six workers, and attaches an organizational reflecting its staffing levels in September 2004. Counsel states:

The beneficiary meets the definition of manager/executive by listing her duties which state she is responsible [for] the overall direction of the [c]ompany. In addition[,] she directly oversees the [g]eneral manager who in turn oversees the daily activities of the company. The beneficiary is responsible for functioning at a high level of responsibilities by initiating expansion plans, establishing budgets and ensuring the overall growth of the company.

The beneficiary does not perform the tasks necessary to produce a product or to provide services. The company employs a shop manager, assistant manager, stylists and a beauty therapist to perform [the] daily activities of the company. Therefore, the beneficiary does meet the definition of manager/executive.

Counsel also addresses the director's reference to whether the beneficiary possesses a master's degree. Counsel states that the petitioner "has not imposed such requirements for the position of president," and states that the petitioner provided the information regarding the beneficiary's master's degree "upon request of [Citizenship and Immigration Services (CIS)] to provide a list of employees and their educational levels."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Throughout the record, counsel identifies the beneficiary as a "manager/executive." A petitioner may not claim to employ a beneficiary 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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). A petitioner must clearly describe the

² The director's findings are partially based on the representation by the petitioner that it would be operating three separate businesses.

duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The limited record does not substantiate the petitioner's claim that the beneficiary would be employed as either a manager or an executive. In both its August 16, 2004 and August 4, 2005 letters, the petitioner submitted vague job responsibilities held by the beneficiary, such as directing the overall operation and "daily activities" of the company, hiring and terminating employees, establishing "financial relations," reviewing business opportunities, determining expansion opportunities, and ensuring the company's growth. Counsel submits an equally vague job description on appeal, noting that the beneficiary would perform "high level" responsibilities of the company, oversee its activities, and monitor its expansion. The petitioner has not enumerated the specific managerial or executive job duties to be performed by the beneficiary on a daily basis as the company's president. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

Counsel clarifies on appeal that the beneficiary's position of president does not require that the beneficiary hold a master's degree. Rather, counsel explains the evidence was presented following the director's request for educational levels. The AAO notes, however, that if the petitioner is relying on the beneficiary's purported completion of a master's program as evidence of her employment as a manager or executive, the record does not contain sufficient evidence, such as the beneficiary's transcripts and diploma. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, as noted by the director, the inconsistencies in the petitioner's staffing levels preclude a finding that the beneficiary would be employed in a primarily managerial or executive capacity. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). 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 the instant matter, the petitioner initially represented its organizational hierarchy as being comprised of the beneficiary as president, as well as a vice-president, manager, hair stylist, massage therapist, facialist, beautician, and manicure/pedicure specialist. However, in its August 4, 2005 response and on appeal, the petitioner presents conflicting evidence, such as different position titles from those originally identified and a revised organizational chart. In particular, the petitioner eliminated the position of vice-president and changed the titles of the subordinate positions to general manager, assistant manager, beauty director/specialist, senior stylist, beauty therapist, and skin care specialist. The AAO notes that the employee initially represented as the company's vice-president is not identified on subsequent organizational charts as an employee of the petitioner. Additionally, the position of skin care specialist was eliminated from the

organizational chart submitted on appeal. The petitioner's response to the director's request for evidence fails to clarify or enhance the description of the beneficiary's role in the United States organization. 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 AAO notes that 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). Furthermore, it is unclear why the petitioner's beauty director-specialist would receive a salary of approximately \$6,000 more than her supervisor, the beauty supply and gift shop assistant manager. 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. 582, 591 (BIA 1988). As a result of these inconsistencies, the AAO cannot determine the petitioner's true staffing levels, or conclude whether the petitioner's reasonable needs are met through the employment of the beneficiary and her purported six-person staff.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. In its August 16, 2004 letter, the petitioner identified the beneficiary as the foreign company's managing director, during which she "was in charge of the operation of the company, including [the] hiring[,] training[,] supervising[,] and discharging of all employees," "handled contract negotiations," and oversaw the company's finances and annual budget. The petitioner also noted in its August 4, 2005 response to the director's request for evidence that the beneficiary oversaw the work of four of the company's department heads, set goals and policies, hired and fired subordinates, "review[ed] production statistics [] pricing guidelines . . . financials, sales, gross receipts, and employee assessment," and reviewed store efficiency. The brief statements offered as evidence of the beneficiary's employment in a primarily managerial or executive capacity are not sufficient to classify the beneficiary as a manager or executive of the foreign entity. Despite the director's request for a "definitive statement" of the beneficiary's position in the foreign company, including the percentage of time the beneficiary devoted to each task, the petitioner neglected to present an outline of specific day-to-day managerial or executive tasks performed by the beneficiary. Again, the actual duties themselves reveal the true nature of the employment. *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). The AAO notes that a petitioner's 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). Absent a more detailed job description of the beneficiary's employment in the foreign entity, the AAO cannot conclude that the beneficiary was employed in a primarily managerial or executive capacity. For this reason, the petition will be denied.

An additional issue not addressed by the director is whether the petitioner was doing business in the United States for at least one year prior to instant filing as required in the regulation at section 204.5(j)(3)(i)(D). As the instant immigrant visa petition was filed on September 2, 2004, the relevant period in question is from September 2, 2003 through the date of filing. The majority of the invoices and receipts submitted by the petitioner as evidence of its business operations in the United States are dated several months prior to September 2003. The petitioner did not submit any invoices or sales receipts dated between October 2003

and September 2004. Additionally, the documentation provided pertains predominantly to items and equipment purchased by the petitioner in anticipation of commencing operations, and does not identify services actually rendered to customers by the petitioner as a beauty salon. The AAO recognizes that the petitioner's 2003 and 2004 tax returns reflect taxable income realized by the petitioner during these years, however, the petitioner has not presented documentary evidence to corroborate that it was doing business in the United States during the year prior to the instant filing. 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. 582, 591 (BIA 1988). Additionally, if CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner has failed to document that it had been doing business in the United States for at least one year prior to the filing of the immigrant visa petition. For this additional reason, the petition will be denied.

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).

The AAO recognizes the beneficiary's previously approved L-1A nonimmigrant petitions. 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(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Furthermore, each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. The approval of a nonimmigrant petition in no way guarantees that CIS will approve an immigrant petition filed on behalf of the same beneficiary. Based on the lack of evidence of eligibility in the current record, the director was justified in departing from the approval of the prior nonimmigrant petitions and denying the immigrant petition.

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.