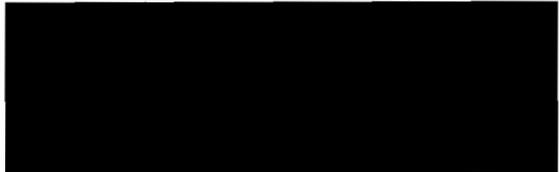




U.S. Citizenship
and Immigration
Services

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File: [Redacted]
SRC 05 249 50587

Office: TEXAS SERVICE CENTER Date: MAY 04 2006

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, 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 appeal will be dismissed.

The petitioner is a corporation organized in the State of Tennessee in July 2003. It was established to promote sales of its parent company's products and to explore the possibility of establishing a manufacturing facility. It seeks to employ the beneficiary as its president and chairman. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on November 9, 2005, determining that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) should consider the petitioner's point of development as a factor when determining whether the beneficiary is an executive. Counsel submits a brief in support of the appeal.

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 that the beneficiary will be employed in a primarily executive capacity for the petitioner. The petitioner does not assert that the beneficiary's employment will comprise primarily managerial tasks.

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 18, 2005 letter appended to the petition, the petitioner stated:

The Chairman/President of [the petitioner] is the chief executive officer and active head of the Company. He performs all of the duties incident to the office of Chairman/President as required or authorized by law, and reports to the Board of Directors. The Chairman/President actively pursues the set-up of strategic partnerships and distributors. The Chairman/President has the sole and exclusive power to hire and fire personnel of the Company, which power he may delegate to the General Manager or other officers of the company as he deems fit. The Chairman/President makes all decisions for the Company which are not reserved to the Board of Directors.

The petitioner added in part:

The Chairman/President directs the management of the organization. The Chairman/President of [the petitioner] is the Chief Executive Officer and active head of the company. He is responsible for overseeing all the employees of the company, who are professionals, managers, and executives. The Chairman/President has the ultimate decision making power in terms of the day-to-day and long-term management of [the petitioner].

The Chairman/President establishes the goals and policies of the organization. As the head of the organization, he leads the company and its employees in implementing the business plan for operations, marketing, and expansion. He confers with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives. He determines the major policies for management, production, and sales. . . . The Chairman/President meets frequently with subordinate executives to ensure that operations are implemented in accordance with these policies. In addition, as Chairman of the Board of Directors, he coordinates and heads the ultimate governing body of the organization as a member-owner.

The Chairman/President exercises wide latitude in discretionary decision[-]making. He reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. He directs and coordinates the formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.

The President only receives general supervision of the Board of Directors. He is responsible to no other higher executive because he is the top management and executive official in the company. He evaluates performance of the other executives for compliance with established policies and objectives of the firm and their contributions to attaining the objectives. The President's broad authority is limited only by the operating agreement.

On October 6, 2005, the director issued a notice of intent to deny the petition. The director noted that the record did not substantiate that the beneficiary would be conducting the duties of a manager, but rather appeared that the beneficiary and an equal partner were the petitioner's only employees. The director requested that the petitioner submit all Internal Revenue Service W-2, Wage and Tax Statements for all the petitioner's U.S. employees, including the beneficiary. The director also requested the petitioner's organizational chart listing the names and dates of employment of all U.S. employees for 2004 and 2005.

In a November 2, 2005 response, counsel for the petitioner indicated that the beneficiary had been transferred to the United States to open a new office and had been working on developing the enterprise since late 2003. Counsel noted the difficulty the petitioner had in developing the business, the company's lack of knowledge regarding proper tax classifications, and that the beneficiary was working on implementing payroll and salary payments that would generate IRS Forms W-2. Counsel added that there was no IRS Form W-2 available for the beneficiary for 2004. Counsel claimed that the petitioner had recently "hired someone to continue to implement the marketing plan and to develop operations and inventory systems."

In addition, counsel stated that the beneficiary held an executive position and was not a manager and that the beneficiary was responsible for all functions and development of the business policies and practices, rather than managing subordinates. Counsel noted that the beneficiary is responsible for finance, operations, sales, marketing, and information management and requested that CIS consider the point of development and size of the business as a factor, as well as considering the reasonable need of the organization, component, or

function, in light of the overall purpose and stage of development of the organization. Counsel repeated the previous description of the beneficiary's duties.

The petitioner's organizational chart depicted the beneficiary as president, as well as showing the beneficiary's immediate subordinate as the vice-president (who owned a 24 percent interest in the petitioner), and a sales and marketing manager reporting to the vice-president.

On November 9, 2005, the director denied the petition, observing that when a petitioner has a limited number of employees it becomes questionable whether a beneficiary is acting primarily as a manager or an executive. The director determined that it was reasonable to conclude that in such a case the beneficiary would be performing a wide range of functions associated with running a business and that are unrelated to the definitions of executive or managerial capacity. The director concluded that based on the evidence in the record, the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner repeated the claims made in her response to the notice of intent to deny. Counsel asserts that the beneficiary meets the requirements contained in the definition of executive capacity and that the beneficiary has developed strategic alliances and secured buyers for the company's products.

Counsel assertion is not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has provided a general description of the beneficiary's duties without conveying an understanding of what the beneficiary does on a daily basis. 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).

In addition, counsel and the petitioner indicate that the beneficiary will "[oversee] all the employees of the company, who are professionals, managers, and executives," "[lead] the company and its employees in implementing the business plan for operations, marketing, and expansion," and "[evaluate] performance of the other executives for compliance with established policies and objectives of the firm and their contributions to attaining the objectives." However, the petitioner has not provided documentary evidence that it employs any personnel. 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)). Despite the director's request for evidence of other employees, including IRS Forms W-2 and an organizational chart that lists the employees' dates of employment, the petitioner failed to provide such information. 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's explanation that it was not aware of the tax requirements to issue IRS Forms W-2 is not sufficient. The petitioner has not provided any other type of evidence that would demonstrate that it employed personnel. The petitioner's claim that it recently had hired additional personnel is not

substantiated. Moreover, 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). The petitioner in this matter has not demonstrated that it has employees to carry out the day-to-day non-qualifying tasks required to operate the petitioner's business.

The petitioner's paraphrase of the definition of executive capacity and generic description of the beneficiary's duties is not sufficient to establish that the beneficiary will perform in a primarily executive capacity for the petitioner. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The petitioner has not established these essential elements and has not shown that the beneficiary will perform primarily in an executive capacity.

Likewise, although the petitioner has not claimed that the beneficiary will perform primarily in a managerial capacity, the record does not substantiate that the beneficiary's duties or the petitioner's organizational structure is sufficiently complex to conclude that the beneficiary will primarily perform in a managerial capacity. The petitioner has not provided documentary evidence substantiating that it employed professional, managerial, or supervisory personnel who would relieve the beneficiary from performing primarily the operational and first-line supervisory tasks of the petitioner. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Further, the petitioner has not claimed and the evidence does not support that the beneficiary performs primarily as a function manager.

Counsel correctly observes 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 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 this matter, the petitioner has not provided evidence that it has attained the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the beneficiary's duties performed on a day-to-day basis. The petitioner has not established that the beneficiary's position with the United States entity will be in a primarily executive or managerial capacity. For this reason, the petition will not be approved.

Beyond the decision of the director, the petitioner did not establish that the beneficiary was employed in a managerial or executive capacity for one year in the three years preceding his entry into the United States as a nonimmigrant for a qualifying foreign 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.

See above for the definition of executive capacity.

The petitioner indicated that the beneficiary was a department manager for the foreign entity. The petitioner indicated that the beneficiary:

[W]as in charge of the operations of the company, production and ordering materials, production scheduling, staffing, equipment, quality control, as well as research and development. He plans, directs, and coordinates the operations of the company including formulating policies, managing daily operations, and planning the use of materials and human resources.

He analyzes the plant's personnel and capital resources and selects the best way to meet the production quota. The Department Manager determines which machines will be used, whether overtime or extra shifts are necessary, and the sequence of production. He also monitors the production run to make sure that it stays on schedule and correct[s] any problem that may arise. He monitors product standards. When quality drops below the established standard, he troubleshoots why standards aren't being maintained and how to improve the product. The Department Manager may implement better training programs, reorganize the manufacturing process, or institute employee suggestions or improvement programs.

The petitioner added that the beneficiary worked closely with the sales, purchasing, and traffic departments and acted as a liaison between the executives and first-line supervisors. The petitioner also provided an organizational chart for the foreign entity showing the foreign entity had three divisions, the management operation division, the factory division, and the U.S. petitioner division. The organizational chart did not identify the beneficiary's position on the foreign entity's organizational chart. The petitioner also provided a statement of allowance purportedly issued to the beneficiary showing that he was the department manager of the trading department.

The petitioner has not provided sufficient detail regarding the beneficiary's foreign position to allow a conclusion that the beneficiary performed in a primarily managerial or executive capacity. Again, 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. at 165. The description of the beneficiary's duties for the foreign entity suggests that the beneficiary performed operational and administrative tasks for the petitioner, such as "ordering materials, production scheduling, staffing, equipment, quality control, as well as research and development," and quality assurance. Again, 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604.) The record does not provide sufficient evidence that the beneficiary performed primarily managerial or executive tasks for the foreign entity for one year prior to entering the United States as a nonimmigrant. For this additional reason, the petition will not be approved.

Additionally beyond the decision of the director, the petitioner has not provided evidence that it was doing business for one year prior to filing this petition on September 13, 2005. Title 8, Code of Federal Regulations, section 204.5(j)(3) states:



(i) **Required evidence.** A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

* * *

(D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

The petitioner has not provided evidence in the form of invoices, shipping documents, tax documents, or other forms of documentation showing that the petitioner actually began conducting business prior to filing the petition. Although the petitioner was incorporated in July 2003, the record does not contain the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for the 2004 year. Neither does the record contain other documentary evidence demonstrating that the petitioner actually operated a business promoting its parent company's product nor does the record show that the petitioner began manufacturing or selling a newly developed product for one year prior to filing the petition. The record is insufficient to establish that the petitioner had begun conducting business one year prior to filing the petition. For this additional reason, the petition will not be approved.

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 acknowledges that CIS has approved an L-1A petition that had been previously filed on behalf of the beneficiary. With regard to the similarity of the eligibility criteria, the AAO recognizes 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). 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.

In general, given the permanent nature of the benefit sought, immigrant petitions are given far greater scrutiny by CIS than nonimmigrant petitions. Accordingly, 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 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).

Moreover 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. *See* 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii). The approval of a nonimmigrant petition does not guarantee that CIS will approve an immigrant petition filed on behalf of the same beneficiary. As the evidence submitted with this petition does not establish eligibility for the benefit sought, the director was justified in departing from previous nonimmigrant approvals by denying the immigrant petition.

In addition, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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).

Further, 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). The petitioner has not provided evidence or argument on appeal sufficient to overcome the director's decision.

Finally, the AAO observes that as the director was justified in departing from the previous nonimmigrant approvals in this matter; the director should review the previous nonimmigrant approvals for revocation pursuant to 8 C.F.R. § 214.2(l)(9)(iii).

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.