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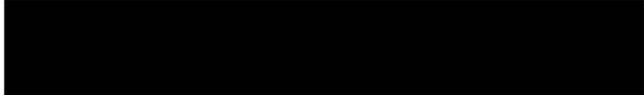
Office: VERMONT SERVICE CENTER

Date: SEP 08 2006

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IN RE:

Petitioner:



Beneficiary:

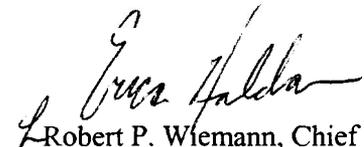
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Vermont 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 visa 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 New Jersey that is engaged in the import and sales of dental equipment. The petitioner seeks to employ the beneficiary as its director.

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.

On appeal, the petitioner suggests that the beneficiary would be employed as a manager of the United States entity. The petitioner submits a letter and documentary evidence 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 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 petition on June 20, 2005 noting the beneficiary's proposed employment as the United States company's director. In an addendum to the Form I-140, the petitioner noted that the job duties associated with the beneficiary's proposed position would include managing the company, exercising responsibility over its personnel, operations, planning, and contractual agreements, "open[ing] distributorships," devising advertising and promotion strategies, promoting the company at trade shows, "develop[ing] a sales force," and selling the petitioner's equipment.

On August 19, 2005, the director issued a Notice of Action requesting that the petitioner submit evidence of the beneficiary's proposed employment in a primarily managerial or executive capacity, including a "complete" description of the beneficiary's proposed position and the positions held by subordinate

employees, an allocation of the amount of time each employee would devote to the tasks associated with each position, and evidence of the petitioner's staffing levels.

The petitioner responded in a letter dated November 8, 2005, noting that the beneficiary would be employed as the company's president, in which he holds the following responsibilities:

[D]irects the management of the entire organization, and has sole authority to contract and commit funds on behalf of the company, such as incorporation, establishing bank accounts, purchasing equipment, and contracting for trade shows.

The petitioner further noted its employment of a sales manager, and its use of three independent distributors located in Illinois, Connecticut, and California to "sell, install and maintain the equipment in individual dental offices." The petitioner attached a proposed organizational chart of the United States entity, noting the beneficiary's position as "managing director." Attached payroll records ending the period of September 30, 2005 identified the beneficiary as the sole employee from June 30, 2005 through September 30, 2005, and suggested that the employment of the petitioner's sales manager was terminated at the end of June 2005, the month during which the instant petition was filed.

In a decision dated January 3, 2006, the director determined that the petitioner had not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted inconsistencies in the compensation claimed by the petitioner to have been paid to its petitioner's sales manager and distributors and the amounts reported on the petitioner's corporate income tax return. The director addressed the organizational chart provided by the petitioner, stating that the record "does not reflect that the company has grown to the point where the proposed staffing has been achieved." The director also stated that there was "insufficient evidence to demonstrate that the United States entity (petitioner) employs a subordinate staff of professional, managerial, or supervisory personnel," or that it would be "financially capable" to support its proposed staffing levels. The director concluded that the beneficiary's job duties would not be primarily managerial or executive in nature. Consequently, the director denied the petition.

On appeal, the petitioner notes the beneficiary's employment as the "company manager," in which he primarily guides sales personnel, trains "technical support employees in the branches," manages the company's "orders system," and "[is] involved in the daily administration of the company and its branches." The petitioner explained that during its first two years of operation "emphasis was placed on increasing sales and post-sales service by opening new agencies *and less on hiring direct employees* for the company." The petitioner noted its use of outside professionals to perform its bookkeeping, accounting and legal issues, and that it anticipated hiring a sales manager and technical manager "in the near future."

The petitioner also addresses the director's observation of inconsistencies in the compensation reflected on its income tax return, stating that the company's employees were paid lower salaries as a result of its need to invest more money in its marketing program. The petitioner further explained that its distributors, or "branches," were not paid commissions, but rather the petitioner sold its products to them at a price discounted from the invoice amount. The petitioner stated "this is not reflected in the company's balance sheet since sales to the branches are recorded in the balance sheet as regular sales to customers, and become part of the company's total sales." The petitioner submits its July 2005 through June 2006 profit and loss statement on appeal.

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.

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 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. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Here, the petitioner identified the beneficiary as occupying the positions of "director," "manager," "president and general manager," and "managing director." Accompanying documentation portrayed the beneficiary's signature in the capacity as the company's president. The multiple job titles, as well as the brief job description, do not establish the capacity in which the petitioner is claiming to employ the beneficiary. 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).

As noted, the limited job description offered by the petitioner fails to identify the specific managerial or executive job duties to be performed by the beneficiary. The petitioner's brief statements that the beneficiary would possess "responsibility for all management, hiring, operations, and planning," "develop advertising and promotion strateg[ies]," "promote [the petitioner's] products at trade shows," "develop a sales force," and "sell and service equipment," do not clearly describe the managerial or executive duties to be performed by the beneficiary. *See* 8 C.F.R. § 204.5(j)(5). The AAO notes that following the director's request for a "complete position description," including a "breakdown of the number of hours devoted to [his] job duties," the petitioner submitted the same limited job description as that previously provided, thus failing to expound or clarify the specific managerial or executive job duties associated with the beneficiary's employment in the United States company. 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). 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).

Despite its brevity, the beneficiary's job description reveals that he would be responsible for all non-qualifying tasks of the petitioner's functions. For example, the beneficiary would personally handle the petitioner's dealings with financial institutions, would purchase the equipment sold by the petitioner, represent the petitioning entity at trade shows, "contract with distributors," facilitate the company's orders, sell and service the equipment sold by the petitioner, and devise its advertising programs. In addition, the beneficiary's responsibility of training sales and technical support personnel is not typically deemed to be managerial or executive in nature. *See* §§ 101(a)(44)(A) and (B) of the Act. 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).

This finding is bolstered by the fact that the beneficiary is the sole employee of the petitioning entity. 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.

At the time of filing, the petitioner employed the beneficiary and a sales manager. Subsequent employee records, however, reveal that the sales manager's employment with the petitioning entity was terminated at the end of June 2005, approximately ten days after the instant filing. As a result, the beneficiary was clearly responsible for performing the above-noted non-qualifying operational functions of the petitioning entity. Moreover, although not specifically addressed by the petitioner, it is reasonable to conclude that the beneficiary was also personally responsible for maintaining the petitioner's inventory, which would include choosing the products sold by the petitioner. Furthermore, despite the petitioner's claim on appeal of using outside contractors for its bookkeeping and accounting, there is no documentary evidence in the record, such as contractual agreements, invoices or communications with independent contractors, demonstrating that at the time the petition was filed someone other than the beneficiary would perform these non-managerial and non-executive administrative tasks. Consequently, the petitioner has not established that its reasonable needs might plausibly be met by the services of the beneficiary. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner offered for review by the director its proposed organizational chart and anticipated staffing levels. The AAO notes, however, that 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). Therefore, these documents will not be considered in the analysis of the beneficiary's employment capacity.

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, an additional issue is whether a qualifying relationship existed between the foreign and United States entities at the time of filing the immigrant visa petition.

The petitioner notes the existence of an affiliate relationship between the foreign and United States organizations, claiming that the beneficiary is the sole owner of both entities. With regard to the beneficiary's purported ownership of the foreign entity, the petitioner noted that "[t]here are no copies of stock or share certificates for the Israeli entity," and submitted a letter from a certified public accountant, who stated that the beneficiary was the owner of 100 shares of the foreign entity's issued stock. The AAO notes that none of the documentation related to the foreign entity was translated for the record; therefore, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

With respect to ownership of the United States entity, there is insufficient evidence demonstrating that the beneficiary is the sole shareholder of the corporation. The only documentary evidence in the record suggesting that the beneficiary wholly owns the petitioning entity is the petitioner's 2003 federal income tax return, which identified the beneficiary as owning 100 percent of the corporation. The petitioner did not submit stock certificates, the corporate stock certificate ledger, or stock certificate registry, all of which would confirm the petitioner's shareholders and the exact number of shares purportedly issued to the beneficiary or any additional stockholders. 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)). Absent additional evidence establishing the ownership of the foreign and petitioning entities, the AAO cannot conclude that an affiliate relationship exists between the two organizations. Accordingly, the petition will be denied for this additional reason.

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 that Citizenship and Immigration Services (CIS) previously approved two L-1A nonimmigrant visa petitions filed by the petitioner on behalf of the beneficiary. 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 prior nonimmigrant petition approvals 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.