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U.S. Citizenship
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File: [Redacted]
SRC 06 112 52505

Office: TEXAS SERVICE CENTER

Date: JUN 07 2007

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 immigrant 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 petition seeking 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 petitioner is a corporation organized in the State of New York in September 2003, which claims to be engaged in the export of textiles. It seeks to employ the beneficiary as its general manager/chief executive officer.

The director denied the petition on September 29, 2006, determining that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that "unexplained inconsistencies" observed by the director with respect to the petitioner's staffing levels were in fact explained prior to the director's decision. Counsel asserts that the beneficiary will be employed in an executive capacity. Counsel submits a brief and additional 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 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 sole issue addressed by the director is whether the petitioner established that the beneficiary would 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), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 immigrant petition was filed on February 23, 2006. The petitioner stated on Form I-140 that the U.S. company has five employees, and will employ the beneficiary in the role of general manager and chief executive officer. In a letter dated January 10, 2006, the petitioner explained that the petitioner operates two

textile warehouses located in Hidalgo, Texas and Laredo, Texas, from which it exports fabrics to Mexico. The petitioner noted that the company "has a total of five employees, of which 3 are in Laredo and 3 in Hidalgo, Texas." The petitioner described the beneficiary's position as follows:

[The beneficiary] is in charge of company operations and is it's [sic] President and CEO. In this position, he is responsible for all facets of company operations including both the Hidalgo and Laredo distribution centers and the procurement and marketing of our textile products. All employees report to [the beneficiary] and he makes all financial decisions for the company.

The petitioner submitted documentary evidence in support of the petition, including recent sales invoices on which the beneficiary was identified as "sales representative," and copies of Texas Forms C-3, Employer's Quarterly Report, for the first three quarters of 2005, which indicated that the company employed between one and four employees through September 2005. The petitioner did not submit recent quarterly wage reports or provide other evidence of the current staffing of the company.

On July 5, 2006, the director issued a request for evidence in which she instructed the petitioner to submit a definitive statement regarding the beneficiary's proposed U.S. employment including: the position title, a list of all duties, the percentage of time spent on each duty, detailed information regarding the duties and qualifications of the beneficiary's subordinate employees, evidence that the beneficiary manages a function (if applicable), and an explanation regarding who provides the products or services of the company. The director further requested a copy of the U.S. company's organizational chart, and copies of the petitioner's state quarterly wage reports for the past four quarters.

Counsel for the petitioner submitted a response to the director's request on September 18, 2006. The response included the following position description for the beneficiary:

As the General Manager/Chief Executive of an exporter of fabrics from the United States to Mexico, this position is in charge of all facets of company operations, including operations at both the Hidalgo, Texas and Laredo, Texas distribution centers for the procurement, marketing, distribution and export of textile products. This position makes all financial decisions and all employees report to this position.

Function is [sic] financial and banking for the company: 7% of time
Review of products procured for export, classification and evaluation and pricing of these products: 36%
Logistics and international customs coordination: 7%
Overview of product preparations for shipping to customers, specifications to pickers and packers: 7%
Procurement and arrangement of trucking/shipping of products internationally: 24%
Liaison, communications and negotiations with clients regarding product sales: 10%
Miscellaneous personnel supervision, contracting of labor to load and unload products in the two warehouses and facilities matters: 9%

The petitioner indicated that the company employs two employees based in Hidalgo, Texas: (1) a secretary who handles correspondence, filing and provides general office services; and (2) an administrative assistant and documentation coordinator who handles banking transactions and controls preparation of documentation in support of customs and shipping. The petitioner further indicated that its Laredo distribution center is operated by an administrator who performs the duties of a secretary, administrative assistant and documentation coordinator, and also coordinates the hiring of labor to perform physical labor related to loading, unloading and sorting products. Counsel for the petitioner indicated in a cover letter dated September 18, 2006 that the administrator, since January 1, 2006, is paid on a commission basis.

The petitioner emphasized that the petitioner is a small business in which each employee performs broad responsibilities. The petitioner indicated that the administrative assistant and the administrator both function at a senior level within the corporation. Finally, the petitioner stated that liaison with "major clients" is handled by the beneficiary, while sales transactions based on orders received are completed by the subordinate personnel, who receive and fill orders.

The petitioner submitted the requested Texas Forms UCT-6, Employer's Quarterly Report, for the last four quarters. The quarterly report for the first quarter of 2006, the quarter in which the petition was filed, indicates that the petitioner employed three workers in January 2006, but only two employees during the months of February and March 2006. The AAO notes that the beneficiary's spouse, who is identified as the administrative assistant, did not have authorization to work in the United States after January 22, 2006, so it is assumed that the petitioner's employees at the time of filing were the beneficiary and the secretary, who appears to have worked on a part-time basis at a salary of approximately \$500 per month. The AAO acknowledges that the beneficiary's spouse returned to the petitioner's payroll as of April 2006.

Although the petitioner explained that the administrator of its Laredo, Texas location became a commissioned employee on January 1, 2006, the petitioner did not submit any evidence of payments to this employee. The petitioner did submit copies of all canceled checks issued by the petitioner from its Texas State Bank checking account between January 2006 and July 2006; however, none of the checks were issued to the individual identified as the petitioner's administrator.

The director denied the petition on September 29, 2006. The director concluded that the petitioner had failed to establish that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity. The director noted "unexplained inconsistencies" with respect to the petitioner's staffing levels, and specifically observed that the petitioner's administrator did not appear on the petitioner's quarterly wage reports in 2006.

The director further determined that based on the position description submitted, it is not possible to conclude whether the beneficiary would perform primarily managerial or executive duties or whether he would primarily perform "the actual productive and administrative tasks" of the petitioner's business. The director acknowledged that the beneficiary would supervise employees, but determined that his subordinates are not themselves employed in managerial, supervisory or professional positions.

Counsel for the petitioner filed the instant appeal on November 1, 2006. On appeal, counsel for the petitioner contends that the director overlooked the petitioner's explanation that its administrator was not paid on a salaried basis at the time of filing, and therefore erroneously concluded that there were "unexplained inconsistencies" with respect to the petitioner's staffing levels. In support of the appeal, the petitioner submits an affidavit from the beneficiary, who states that the administrator has worked for the petitioner since 2004 on a full-time basis, initially as a regular payroll employee, and, since January 2006, on a commission basis. The petitioner submits copies of 14 deposit slips for monies deposited into the individual's account in the months of May through September 2006, totaling \$17,000. The beneficiary emphasizes that the employee works under his supervision and oversight, although he is paid on a commission basis.

With respect to the beneficiary's employment capacity, counsel further describes the beneficiary's role as follows:

Petitioner urges that [the beneficiary] is employed in an executive capacity, that he is the controlling owner of the Petitioner, that he has all authority over generalized policy of the petitioning organization, and that his duties are solely those of an executive. He specifically notes that he does not perform tasks of producing a product nor providing services, that his primary duty is the management of the enterprise, that he customarily and regularly directs the work of the three other employees of this small company, that he has the authority to hire and fire any employees, that he sets pay and work hours of all employees, determines the type of merchandise to be bought, stocked and sold, controls the flow and distribution of funds and merchandise, controls the company finances and budget and monitors compliance with legal requirements. He also notes that as the principal owner of the petitioner, he is the controlling mind of the business and that he has acquired through many years of experience a knowledge of the fabric retailing business in Mexico which uniquely qualifies him to successfully direct this enterprise.

Upon review of the record in this matter and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed 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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

While the petitioner has consistently indicated that the beneficiary will be employed in an executive capacity, the petitioner's description of the beneficiary's duties does not support a conclusion that he will perform primarily executive duties as defined by the statute. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

While the beneficiary will evidently exercise authority over the U.S. entity as co-owner, general manager and chief executive officer of the company, the petitioner's description of the beneficiary's duties indicates that he is primarily engaged in the day-to-day operations of the company. The petitioner stated that the beneficiary allocates 36 percent of his time to reviewing, classifying, evaluating and pricing products procured for export, and an additional 24 percent of his time to "procurement and arrangement of trucking/shipping of products internationally." The petitioner does not indicate that the beneficiary supervises the performance of these non-executive duties through lower-level employees. Rather, based on the petitioner's representations, the beneficiary is directly performing the product research, evaluation, and procurement functions of the company, and personally making trucking and shipping arrangements, and these non-qualifying duties require the majority of his time. 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).

In addition the petitioner indicates that the beneficiary devotes an additional 24 percent of his time to overseeing the packaging of products, coordinating logistics and international customs, and performing liaison, communications and negotiations with customers regarding product sales. The petitioner has not established that these first-line supervisory, logistics and sales duties are executive in nature. While the petitioner indicated that the beneficiary's subordinates take routine sales orders, the beneficiary himself appears to be responsible for obtaining clients and marketing the petitioner's products. 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). Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role.

An analysis of the reasonable needs of the corporation in conjunction with its overall purpose and stage of development undermines the petitioner's claim that the beneficiary would be employed in a primarily managerial or executive capacity, as the record does not show that the beneficiary's subordinates would relieve the beneficiary from performing many of the day-to-day functions of the company. 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.*

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's ongoing performance of non-qualifying duties.

The petitioner indicated that it operates as a purchaser and exporter of textile products, operating "distribution centers" at two different locations in Texas, with sales of nearly \$700,000 in 2005. At the time of filing, the petitioner claimed to have three workers at each of its locations. The evidence submitted in response to the director's request for evidence confirmed the employment of the beneficiary and a part-time secretary as of the date of filing in February 2006. 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 petitioner also claimed to employ an administrative assistant, a full-time administrator, and contract labor on an as-needed basis. The petitioner has not submitted evidence that the administrative assistant was employed in February or March 2006, nor did the petitioner provide any evidence of payments to contract labor. 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 AAO acknowledges that, contrary to the director's findings, the petitioner did provide an explanation with respect to the absence of payments to the "administrator" reported on the company's 2006 quarterly wage reports. However, although the petitioner has supplemented the record on appeal, the record still does not contain persuasive evidence that this employee worked for the petitioner on a full-time commission basis as of the date of filing. First, the AAO notes that the payments made to the employee during his tenure as a payroll employee in 2005, which amounted to \$510 per quarter, were not consistent with full-time employment. Second, the petitioner has not submitted any evidence of payments to this employee during the first quarter of 2006. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Finally, the evidence submitted on appeal, which consists solely of deposit receipts for checks deposited into the claimed employee's bank account, does not actually identify the petitioning company as the issuer of the checks, and is thus not supportive of the petitioner's claims that it paid this individual \$17,000 over a five-month period. Although the petitioner has had multiple opportunities to provide it, the record is devoid of any probative evidence of payments to the petitioner's claimed administrator in 2006. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The petitioner has not established that the reasonable needs of an export company operating two distribution centers could be met by a general manager/chief executive officer and a part-time secretary. Further, even if the petitioner had established that it employed all three claimed subordinates, as discussed above, the petitioner's description of the beneficiary's duties indicates that he performs primarily non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

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-day 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.* While the beneficiary may exercise some discretion over the petitioning company as its general manager, the petitioner has neither claimed nor presented evidence to establish that the beneficiary devotes the majority of his time to the goals and policies of the organization, rather than participating in the day-to-day operations. Counsel's assertions on appeal that the beneficiary "does not perform tasks of producing a product or providing services" and that his duties "are solely those of an executive," are not supported by the evidence of record. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Based on the foregoing discussion, the petitioner has not established that the U.S. would employ the beneficiary in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to his transfer to the United States as a nonimmigrant. The petitioner indicated that the beneficiary served as principal operating officer and general manager of its Mexican affiliate, a wholesaler distributor and retailer of imported fabrics, from December 2001 until January 2004. The record contains no other description of the beneficiary's employment with the foreign entity, and therefore it cannot be concluded that he was employed in a primarily managerial or executive capacity. The director did request an organizational chart for the foreign entity, but the petitioner submitted a chart depicting the current structure of the company as of 2006, rather than a chart identifying the beneficiary's position within the company prior to his relocation to the United States in 2004. 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. Based on the minimal evidence submitted, the petitioner has not met its burden to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the petition cannot 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.