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**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

MAR 02 2004

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

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:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the employment-based visa petition. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner is a corporation organized in the State of California in March 1999. It operates a bathroom fixtures and hardware store, doing business as HD Altmans. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The director also included a reference that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. The AAO dismissed the petitioner's appeal finding that the petitioner had not provided sufficient evidence to overcome the director's determination on the issue of the beneficiary's managerial or executive capacity. The AAO withdrew the director's reference regarding the failure of the petitioner to establish a qualifying relationship with the beneficiary's foreign employer.

On motion, counsel for the petitioner asserts that the law was inappropriately applied in this matter. Counsel submits affidavits from the beneficiary's three subordinate employees and a copy of the petitioner's 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Additionally, the regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner does not provide new facts for consideration in this proceeding. The three employees' statements do not provide new evidence but offer their interpretation of the beneficiary's duties. Employee statements were previously available and could have been presented in the prior proceeding. In addition, the statements confirm that the beneficiary's duties are the duties of a first-line supervisor who also is the individual responsible for negotiating contracts and acting as the petitioner's buyer. As counsel observes, the AAO consistently follows *Matter of Church Scientology International* wherein 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the petitioner lists the beneficiary's duties as managerial, but fails to quantify the time he spends on them. This failure of documentation is important because, as observed above, several of the beneficiary's ordinary tasks do not fall directly under traditional managerial duties as defined in the statute. The AAO cannot conclude the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel does not explain how the petitioner's 2001 IRS Form 1120 demonstrates the beneficiary's managerial or executive capacity. The petitioner has established that it is a small viable entity operating a bathroom fixture and hardware store. The issue in the proceeding is whether the beneficiary's contribution to the operation of the store consists of providing primarily operational services rather than performing primarily managerial tasks. As observed above, the petitioner has not provided new evidence to establish that the beneficiary's day-to-day duties are primarily managerial or executive.

Counsel for the petitioner asserts that the AAO inappropriately applies the law in this matter and cites unpublished decisions to support the assertion. However, unpublished decisions are not binding on Citizenship and Immigration Services (CIS) in its administration of the Act. *See* 8 C.F.R. § 103.3(c). In addition, counsel cites decisions not relevant to the matter at hand, as the decisions do not relate to the review of a claim for a multinational manager or executive under section 203(b)(1)(C) of the Act.

In addition, counsel misstates the impact of changes to the Immigration Act when asserting that "[t]he new law specifically bars the number of persons supervised as the sole basis for denying managerial status to an employee. Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support her argument. Accordingly, counsel's unsupported assertion is not persuasive on this point. As the AAO's decision reflected, and the petitioner has not provided new evidence to the contrary, the record demonstrates that the beneficiary's duties consist of providing services to the petitioner and acting as a first-line supervisor.

Further, counsel does not provide new evidence that the petitioner's reasonable needs overcome the requirement that the beneficiary's assignment pertain to the performance of managerial or executive duties. Counsel does not provide pertinent case law to demonstrate how CIS inappropriately applied the law. 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 performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if the director approves 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 AAO takes note that the affidavits of the petitioner's employees indicate that the beneficiary bought the bathroom fixture and hardware store. Such statements undermine the petitioner's claim that it is a wholly owned subsidiary of a foreign entity. It appears the petitioner may have been created to provide access to the beneficiary and his family to transfer to America. Reopening this matter would require a closer examination of the petitioner's qualifying relationship with the beneficiary's claimed overseas employer.

However, a motion to reopen or reconsider must meet the regulatory requirements of a motion to reopen or reconsider at the time it is filed and 8 C.F.R. § 103.5(a)(4) states: "A motion that does not meet applicable requirements shall be dismissed." The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.