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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 01 044 53891

Office: VERMONT SERVICE CENTER

Date: 09 APR 2002

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)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rosemy
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner purports to be an affiliate of Sintese-Sociedade Comercial, Ltd. (Sintese) a company doing business in Angola. The petitioner was incorporated in August of 1999. The beneficiary was approved for L-1A visa classification on December 10, 1999 and entered the United States in March of 2000. The L-1A visa classification expired November 30, 2000. The petitioner is engaged primarily in the business of exporting computers, peripherals and accessories. It seeks to employ the beneficiary as its president. 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 primarily managerial or executive capacity.

On appeal, counsel asserts that the petitioner and the beneficiary meet the statutory and regulatory definitions and therefore should be granted the requested status.

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.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed 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. 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), 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 submitted a copy of a letter in support of the petitioner's L-1A request for the beneficiary that outlined the beneficiary's duties for the petitioner as follows:

[The beneficiary] is responsible for strategic planning and corporate financial management, including treasury functions. As President of [the petitioner], [the beneficiary] has been and will continue to be responsible for the following: negotiate and execute corporate contracts; business acquisitions; corporate planning, banking and financial management; delegation of authority as needed; outsourcing of requisite storage and shipping to suppliers or others; creation of business support infrastructure through suppliers and buyers; and the exercise of discretionary authority over the day-today [sic] operations of the company, including business location, hiring, and firing of personnel.

The petitioner also submitted a translation of the beneficiary's appointment letter dated October 19, 1999. The appointment letter indicated that the beneficiary would be responsible to the petitioner for the following:

Administrative - supervision of all legal and account functions
Financial - contacts with banks and monetary issues
Commercial - search of prospects suppliers
Export - supervision of documentation, shipments and Customs requirements

The petitioner also submitted an agreement dated June 27, 2000 wherein a third company agreed to include the cost of warehousing, shipping and transporting of goods purchased from it to the destination designated by the petitioner.

The director requested additional evidence including a complete job description for all the petitioner's employees, including the beneficiary, and a breakdown of the number of hours devoted to each of the employees' job duties. The director also requested

documentation of the number of contractors used by the petitioner, if any were used. The director further requested documentary evidence in the form of the Internal Revenue Service Employer's Quarterly Tax Returns and Internal Revenue Service Form W-2s.

In response, the petitioner submitted the beneficiary's job description with examples of the beneficiary's activities as follows:

4 Hours: 1) negotiate and execute corporate contracts & business acquisitions

4 - 12 Hours: 2) perform corporate planning; (moved company to New Jersey, negotiated and signed lease; negotiated agreement with GLOBALINK USA to perform storage, shipping and customs for products sold; negotiated contracts for sales of computer equipment to Angola)

8 Hours: 3) manage banking and financial matters (letters of credit, hiring and firing of accountant(s); wire transfers, business banking, representation of the company in Angola)

8 Hours: 4) delegate authority as needed (to Globalink USA and to Anne Tromp, Administrative and Financial Assistant, who handles clerical duties along with Karen Vaughn, clerk); outsource responsibility for storage and shipping (GLOBALINK USA handles storage, shipping and customs declarations for the products sold to Angola)

16 Hours: 5) Creation of business support infrastructure through suppliers and buyers (Created demand for supply of computers and computer equipment, by business negotiations in Angola; outsourced all storage, shipping and customs to GLOBALINK USA; hired CPA for tax purposes, delegated to Anne Tromp bookkeeping on software and instructs and delegates assignments to follow through for the business at hand), including ongoing and repeat orders.

7.5 Hours: 6) Exercises discretionary authority over the day-today [sic] operations of the company, including business location (moved company from New York to New Jersey, applying for Authority To Do Business in New Jersey), hiring, (hired Anne Tromp and Karen Vaughn and Marc Stern as Certified Public Accountant for taxes).

.45 Hours: 7) May also evaluate, negotiate and purchase real estate as part of the long term expansion for the company.

The petitioner also re-stated the beneficiary's duties as follows:

[The beneficiary] is responsible for envisioning the computer export business, negotiated the contracts for same, investigated, "hired" and delegated storage, shipping and customs duties to Globalink, hired staff to date, moved the company to New Jersey (fine road connections with Port Elizabeth, plus more suburban lifestyle and closer to her residence there); [the beneficiary] also hired a Certified Public Accountant, and stabilized the company by her presence. She has since returned to Angola, in part to exercise her continuing duties with the parent company, but also to manage the sale and distribution of goods shipped there under contract. Thus, [the beneficiary] manages an "essential function" of marketing and financial planning for the company, in her roles as MANAGER: BUSINESS DEVELOPMENT & OPERATIONS.

The petitioner also provided a breakdown of duties for the administrative & financial assistant as follows:

Provide Administrative support for office to include, correspondence, filing, scheduling appointments, faxing and e-mail, 6 hours;

Coordinate administrative services which may include insurance, telecommunications, purchasing, maintenance and updating of software programs, mail and messenger services, 4 hours;

Record and input of payroll information, payroll journals, liaise [sic] with accountants for payroll tax returns, prepare checks for signature by manager, 2 hours;

Coding of Order entry, Purchasing, Accounts Payable, Accounts Receivable data for input by General Clerk, Maintenance of banking records and General Ledger, Preparation of interim accounting statements and Financial reports for Manager's review, 12 hours;

Word Processing/Desk Top Publishing for correspondence, stationery, presentation materials, using Microsoft Office 2000 software, 4 hours;

Maintain daily activities with Customs broker, clearing agent, suppliers and customer enquiries [sic], 7 hours;

This position reports to the Manager, Business Development and Operations. . .

The petitioner also provided a breakdown of duties for the general clerk as follows:

Coding, input and posting of Order entry, Purchasing, Accounts Payable, Accounts Receivable data to Dac Easy Accounting program, 12 hours;

Provide Administrative support for office to include, correspondence, filing, scheduling appointments, faxing and e-mail, 8 hours;

This position reports to Manager, Business Development and Operations. . . .

The petitioner also provided its Employers Quarterly Tax Returns confirming the employment of the beneficiary and two other individuals.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity but that the beneficiary was involved and participating in the day-to-day non-executive aspects of the business. The director further determined that the record demonstrated that the beneficiary would be performing the function of the organization. The director concluded that based on the evidence submitted, the petitioner had not established that the petitioner had sufficient staff to relieve the beneficiary from performing the services of the corporation.

On appeal, counsel asserts that the petitioner and beneficiary have already been granted L-1A status and such a grant supports the immigrant employment based petition. Counsel also asserts that the denial of this employment based petition after a grant of the L-1A petition, when the beneficiary has increased managerial duties, represents a "taking" of the "property" of the petitioner. Counsel further asserts that a small business can support an executive or a managerial position and the Service's interpretation discriminates against small businesses. Counsel finally asserts that the Service's characterization of operational duties is vague and that the Service has exhibited bad faith in failing to adjudicate applications in a timely manner.

Counsel's assertions are not persuasive. Counsel's assertion that a previous approval of L-1A classification for the beneficiary necessarily requires the approval of employment-based classification is without merit. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988). Counsel's assertion that the beneficiary's managerial duties have increased

since the approval of the L-1A classification is not supported in the record. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel's assertion that the Service's decision is a "taking of the petitioner's property" is not within the purview of this office. The Service is required to determine whether the beneficiary has been and will be functioning in an executive or managerial capacity. The Service must necessarily rely on the evidence submitted by the petitioner when making this decision. The burden of proof in these proceedings is on the petitioner and when the petitioner does not provide sufficient evidence to demonstrate that the beneficiary meets the criteria of the statutory definition, the Service must deny the petition. The denial of a petition is an exercise of Service authority as delegated by the Attorney General. 8 C.F.R. 103.1(f)(3)

Counsel assertion that a small business can support an executive or a managerial position is correct. However, not all small businesses do support executive or managerial positions as defined by the Act. The petitioner has provided lengthy, repetitive descriptions of the beneficiary's duties. However, the descriptions provided support the director's determination that the beneficiary is performing the necessary functions of the petitioner. The petitioner has indicated that its primary purpose is to export computers and related equipment to the parent company in Angola. The petitioner has indicated that the beneficiary is the one who is responsible for negotiating and executing the contracts for the sale of computers, is responsible for the business negotiations in Angola that created the demand for the exported computers and is the individual who returns to Angola to supervise the sale and distribution of the goods in Angola (as well as continuing the operations of the affiliated company in Angola). These duties indicate that the beneficiary is the person primarily responsible for selling the petitioner's goods. 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). In addition, the petitioner's breakdown of the hours the beneficiary performs certain duties is questionable. The petitioner uses the same activities to illustrate the beneficiary's performance of corporate planning, delegating authority, creating a business infrastructure and exercising discretionary authority. The petitioner ascribes a significant amount of the beneficiary's weekly time to these duties. However, the examples provided, such as negotiating an agreement with Globalink and moving the office, do not appear to plausibly include a complete description of the beneficiary's weekly activity.

On review of the complete record, the petitioner has not provided sufficient information to demonstrate that the beneficiary will be directing the management of the organization or a major component or function of the organization. There is also insufficient information in the record to conclude that the beneficiary will be managing the organization or a department, subdivision, function, or component of the organization. The record supports a finding that the beneficiary is performing the tasks necessary for the operation of the petitioner. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

Counsel's assertion that the Service is acting in bad faith by failing to adjudicate applications timely is misguided. The Service adjudicates applications in order of receipt and strives to adjudicate all applications in an expeditious manner.

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.