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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

[Redacted]

File: [Redacted]

Office: TEXAS SERVICE CENTER

Date: 15 APR 2002

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)

IN BEHALF OF PETITIONER:

[Redacted]

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

for Robert P. Wiemann, Director
Administrative Appeals Office



DISCUSSION: The Director of the Texas Service Center denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Florida corporation that claims to be engaged in the export of pharmaceuticals to South America. It seeks to employ the beneficiary as its director of operations and, therefore, endeavors 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 director denied the petition because the evidence in the record did not support a finding that the petitioner (1) currently employs and would continue to employ the beneficiary in a primarily managerial or executive capacity, or (2) has the ability to pay the proffered wage of \$750 per week (\$39,000 per year) to the beneficiary.

On appeal, counsel submits a brief. Counsel states, in part, that the beneficiary manages an essential function and works primarily as an executive.

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.

I. EXECUTIVE OR MANAGERIAL CAPACITY

The director found that the beneficiary was not working primarily as an executive or manager because the petitioner's attorney maintained that the beneficiary was managing an essential function yet did not describe or explicitly state the essential function that the beneficiary allegedly managed. The director further

questioned the beneficiary's role with the petitioner because the petitioner indicated that it employed a limited number of staff members (2 employees).

On appeal, counsel stresses that the beneficiary manages an essential function, and functions at the most senior level within the organization. Counsel argues that the Service is prohibited from using staffing levels as an exclusive basis for determining whether an individual works in a primarily executive or managerial capacity, and states that the Service must take into consideration the reasonable needs of the organization. Counsel compares the facts in this decision to an unpublished Administrative Appeals Office (AAO) decision.

As the record is presently constituted, the Service does not find that the proffered position meets the definition of executive capacity or managerial capacity. As shall be discussed, counsel's arguments on appeal are flawed.

Pursuant to 8 C.F.R. 204.5(j)(2):

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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

- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

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. I.N.S., 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. (Wash.)).

The petitioner fails to establish that the beneficiary works in an executive or managerial capacity because the evidence does not indicate that the beneficiary primarily directs the management of the organization or a function of the organization, or manages the petitioner or a function of its operations.

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. Instead, an executive's duties must be the critical factor. However, if the Attorney General fails to believe the facts stated in the petition are true, then he may reject it. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001).

In response to the director's May 30, 2000 request for evidence, counsel described the beneficiary's job duties and the petitioner's organizational structure. According to counsel, the beneficiary is:

Responsible for planning, coordinating and directing an essential function of the company. Responsible for developing and establishing the company's policies and objectives in accordance with the guidelines set by the Board of Directors. Responsible for reviewing the activity reports and financial statements to determine the progress of the U.S. company as well as revising objectives in accordance with current conditions. Ha[s] the ultimate authority in the hiring and dismissal of employees and for evaluating their performance for compliance with the company's established policies and objectives.

Here, counsel does not provide any detail about the actual job duties that the beneficiary executes or identifies in any meaningful way the alleged essential function that the beneficiary plans, coordinates and directs. Counsel merely presents a broad job description for the beneficiary that reiterates the criteria set forth in the definition of executive capacity. "Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations." 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).¹

The Service notes that an individual who works in an executive or managerial capacity may perform duties that would not generally be classified as executive or managerial level tasks. However, the petitioner bears the burden of establishing that the beneficiary *primarily* executes executive or managerial duties and any non-executive or non-managerial duties are merely incidental to the position. In this case, the petitioner has not met its burden of showing that the beneficiary directs the management of an essential function or manages an essential function on a primary basis because the beneficiary's daily activities are unknown. The petitioner has chosen to submit only a vague job description for the beneficiary that does not identify the essential function that the beneficiary allegedly manages or specifies, with any meaningful detail, the beneficiary's actual job duties. (Emphasis added.)

Furthermore, the petitioner has presented discrepant information about its staffing levels, which does not support a conclusion that the beneficiary supervises a staff who executes the petitioner's daily non-executive and non-managerial duties.

On the I-140 petition that the petitioner filed on March 6, 2000, it indicated that it employed only one individual, who was the beneficiary. A copy of the petitioner's 1999 corporate income tax return (Form 1120) also showed that the petitioner did not pay any wages or salaries to any individuals. However, in its August 22, 2000 response to the director's request for evidence (RFE), counsel claimed that the beneficiary supervised two employees, who were identified as the general manager and a customs clerk.

For immigrant visa petitions, the commissioner has held that, to establish a priority date, a petitioner must establish eligibility at the time of filing the immigrant petition; an

¹ The court in Fedin Bros. Co., Ltd. v. Sava also noted that "[t]he actual duties themselves reveal the true nature of the employment." See id. at 1108.

immigrant petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

In his response to the director's RFE, counsel did not indicate when the two employees were hired or explain why the petitioner originally claimed that it employed only the beneficiary and was now claiming to have three individuals on its payroll. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, neither counsel nor the petitioner has explained when the petitioner hired the two employees. Thus, the petitioner cannot now claim that the beneficiary supervises a subordinate staff of individuals who perform all of the non-executive and non-managerial duties that must be accomplished for the petitioner to operate. Thus, the Service cannot conclude that the beneficiary is working in an executive or managerial capacity as those terms are defined in the regulation.

Finally, counsel refers to an unpublished AAO decision, which found that the beneficiary met the requirements of serving in a managerial and executive capacity for the claimed immigrant classification. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in this unpublished case. Furthermore, while 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

II. ABILITY TO PAY

The director also denied the petition on the basis that the petitioner does not have the ability to pay the proffered wage of \$39,000 per year. Counsel has not addressed this issue on appeal and, therefore, no evidence has been presented to overcome the director's findings. Thus, this additional ground for denial will not be examined further.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.