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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 00 018 54536 Office: VERMONT SERVICE CENTER Date: 22 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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a service company that markets water purification systems to large municipal and industrial water purification facilities. It seeks classification of 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 had been or would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary supervises, controls and directs subcontractors and is a functional manager.

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 was incorporated in February of 1992 in the state of New York. The petitioner states in a letter accompanying the petition that the president of the petitioner and his wife each own a 50% equal share in the petitioner and its Canadian affiliate. The petitioner's 1998 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return shows gross receipts in the amount of \$226,821 and profit in the amount of \$60,482. The IRS Form 1120 does not show any payment of salaries, compensation of officers or commissions paid. In a letter accompanying the petition, the president of the petitioner stated the following:

[The beneficiary] has been an L-1A [sic] for the past six years and business has now grown to the point we can use him permanently in the U.S. In this position [general manager] he will continue to manage the operations, and coordinate the construction and delivery schedules of both the U.S. and Canadian companies. He will be based in the U.S. and continue to report directly to the president. He will also assist the president in formulating sales and marketing strategy to increase sales.

The president of the petitioner concluded his statement by indicating that, "[the beneficiary's] services are essential to the continued success of the U.S. business."

The director requested that the petitioner submit additional evidence showing the management and personnel structure of both the United States and Canadian companies. The director also requested the number of employees and duties of the employees for the United States firm.

In response to the director's request, the petitioner submitted the petitioner's organizational chart showing, a president, secretary-treasurer, a general manager [the beneficiary] and a notation indicating other employees numbering from three to five. The organizational chart for the Canadian entity showed the same positions with a notation that the Canadian entity employed from four to ten employees. The petitioner also provided the following job description for the position of general manager:

The General Manager directs all business operations of the corporation, including sales, service, marketing and administration. He coordinates the construction, delivery and installation schedules of both the U.S. and Canadian corporations, and he supervises and

directs all general employees in the performance of their duties. The General Manager exercises a wide range of discretionary decision making authority, subject only to general supervision and direction from the board of directors and shareholders. He has the authority to hire and dismiss employees. He also assists the President in formulating sales and marketing strategy to increase sales.

The director determined that the beneficiary was primarily engaged in providing sales and services to the petitioner's clients. The director further determined based on the size and scope of the U.S. entity that the beneficiary would not be engaged primarily in executive or managerial duties.

On appeal, counsel for the petitioner asserts that, "[a] key function to the [petitioner's] success is the continued managing of corporate and individual subcontractors, review of services and supplies needed, pricing of jobs, coordination of delivery schedules, formulating sales and growth in the market place, of which [the beneficiary] is in charge." Counsel also asserts that the duties and responsibilities of the beneficiary demonstrate that the beneficiary is a manager essential to the organization. Counsel cites a number of unpublished cases as well as published cases in support of her assertions. Counsel also provides a list of eleven sub-contractors purportedly used by the petitioner.

Upon review, counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner submitted a broad position description which vaguely refers, in part, to duties such as "manag[ing] the operations, and coordinat[ing] the construction and delivery schedules of both the U.S. and Canadian companies". In the response to the request from the director, the petitioner added that the beneficiary, "directs all business operations," "supervises and directs all general employees", "exercises a wide range of discretionary decision making authority", and "has the authority to hire and dismiss employees." These statements merely hint at elements of the statutory definition of managerial and executive capacity without describing the actual duties of the beneficiary with respect to the daily operations of the company. The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

In addition, the petitioner has not supplied documentary evidence to indicate that it employs any individuals. The petitioner's IRS Form 1120 does not report any salaries or commissions paid. The record is devoid of contracts or other agreements that indicate the petitioner regularly operates its business through the work of

others. Submitting a list of subcontractors without documentary support that the subcontractors provided services, were supervised and were paid provides little insight into the daily activities of the beneficiary. 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). Upon review, the description of the beneficiary's job duties and the evidence submitted in support of the description are not adequate to support a finding that the beneficiary has been and will be primarily employed as a manager or executive.

Counsel incorrectly cites a number of cases in an effort to claim that the beneficiary's "duties and responsibilities as outlined above, [would lead one] clearly to the conclusion that [the beneficiary] is essential to the organization." The decisions that counsel relies on are not relevant to the present matter as none of the cited cases review a claim as a multinational manager or executive under section 203(b)(1)(C) of the Act. The cited law is not persuasive in contending that the beneficiary is essential to the organization. The petitioner appears to rely on the fact that as the beneficiary is identified as a manager of the petitioner and as there seem to be no other employees, his work is essential to the organization. However, as noted above and in the director's decision, the petitioner has not supplied evidence to show that the beneficiary is actually managing the organization rather than performing the services necessary for the day-to-day operations of the company. Moreover, the unpublished decisions relied upon by counsel are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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, the Service 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 was a ten-year-old service company that claimed gross income of \$226,821. The petitioner apparently employed the beneficiary as general manager, and the two shareholders of the company acted as the president and secretary-treasurer. The petitioner also claimed to employ three to five additional individuals but provided no supporting documentation to establish this claim. It is noted that all named employees, the president, secretary-treasurer and the beneficiary possessed managerial or executive titles. The petitioner did not submit evidence of subordinate staff members that would perform the actual day-to-day non-managerial functions of the company. The petitioner did not submit adequate evidence to establish that

subcontractors performed the actual day-to-day operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and the two shareholders identified by title as executive employees. 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. As discussed above, the petitioner has not established this essential element of eligibility.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the definition of managerial or executive capacity. The petitioner has not provided an adequate description of the essential function it claims the beneficiary serves. Instead, the petitioner through its counsel concludes that a sole employee must be essential to the organization, rather than describing how the manager "manages an essential function" and is not performing the essential function.

Finally and beyond the decision of the director, we note that the petitioner has offered inconsistent information regarding the ownership and control of itself and the purported affiliated Canadian entity. The petitioner claims that the president and the secretary-treasurer each own 50 percent of the U.S. and Canadian entity. However, the petitioner has submitted stock certificates and stock ledgers showing the president of the Canadian entity owns 3,750 shares of the Canadian entity and the secretary-treasurer owns 250 shares of the Canadian entity. The president of the Canadian entity is also shown to own 51 percent of the U.S. entity and the secretary-treasurer is shown to own 49 percent of the U.S. entity. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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 (BIA 1988). As the appeal will be dismissed for the reason stated above, this issue is not 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. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.