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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: EAC 00 018-53930 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:



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

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 corporation organized in the state of California and is engaged in travel management for Japanese firms in the United States. 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 an executive or managerial capacity.

On appeal, counsel for the petitioner submits a brief. Counsel asserts that the beneficiary has been and still is a manager for the petitioner. Counsel also asserts that the beneficiary manages an essential function of the petitioner's New York Regional Office.

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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside

the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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.

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. 8 C.F.R. 204.5(j)(5).

In a letter submitted with the initial petition, the petitioner indicated that the beneficiary would be filling the position of office manager in the petitioner's New York office. The petitioner briefly described the position as follows:

[the beneficiary] is responsible for directing the day-to-day management of the New York office, participating in decision-making process regarding the types of services [the petitioner] will provide, participating in decision-making process regarding [the [petitioner's] expansion opportunities, establishing organizational goals and policies for the office, analyzing the Eastern United States market for company's services, directing and coordinating marketing strategies and marketing methods for the office, securing relationships and negotiating transactions with cargo clients, securing relationships and negotiating transactions with corporate clients,

supervising employees in the New York office, and preparing annual employee performance evaluations.

In response to the director's request for a definitive statement describing the specific job duties of the beneficiary for the United States entity the petitioner submitted the following responsibilities:

Supervising and evaluating employees at the New York office:

- 1) Training and evaluating day-to-day employee job quality and control of Departmental Supervisors and Travel Consultants.
- 2) Holding annual evaluation interviews of Departmental Supervisors and Travel Consultants in November.
- 3) Recommending hiring, firing, discipline of employees.
- 4) Recommending salaries increases of Departmental Supervisors and Travel Consultants based on the results of the evaluations.
- 5) Coordinating and supervising holidays and leave for employees.
- 6) Planning corporate events to promote employee well-being and loyalty.

Directing the day-to-day management of the New York office:

- 1) Establishing goals and policies for the New York office with General Manager.
- 2) Prepare annual budget for the New York office.
- 3) Directing and coordinating marketing strategies and marketing methods for the office.
- 4) Negotiate contracts and ensure contract compliance (confirming that commissions comply with contracts with airline companies and that tickets are issued as per the contract terms).
- 5) Preparing and analyzing the weekly ARC (Airline Reporting Company) Sales Reports.
- 6) Handling customer complaints.

Participating in decision-making process regarding the types of services [the petitioner] will provide:

- 1) Analyzing the Eastern U.S.A. market with the aim of expanding the company's services.
- 2) Making decisions about setting targets as an organization with the aim of expanding the business of the New York office.
- 3) Deciding the New York office's marketing strategies and sales promotion activities.
- 4) Deciding the content and quality of services regarding trips to return to one's post in various cities in the Eastern U.S.A., including New York City.

- 5) Preparing and marketing proposals and plans for new corporate sales.
- 6) Planning special marketing campaigns to stimulate demand in slow seasons.
- 7) Analyzing the services offered in Boston, Philadelphia, Washington D.C., and Pittsburgh by competitors and adjusting marketing strategies.
- 8) Developing strategies for joint sales with the Cargo Division of [the petitioner's parent company] in the cities mentioned in item g above.
- 9) Renewing contracts with airline companies once or twice a year, and working out additional contracts.
- 10) Gathering information, and conducting marketing presentations for promoting group tours in the Eastern U.S.A.
- 11) Working out marketing and sales strategies for promoting trips to return temporarily to one's country, business trips, and leisure trips.

Strengthening relations and negotiating transactions corporate accounts:

- 1) Negotiating contract terms with major corporate accounts.
- 2) Consulting on trips to return to one's post or to return temporarily to one's country by [the petitioner's parent company's] employees and their families.
- 3) Participating in [the petitioner's parent company's] Management Meetings and exchanging information.
- 4) Negotiating joint sales with managers at the various [petitioner's parent company's] branch offices in the Easter U.S.A.
- 5) Consulting on business trips and other trips by key persons and VIPs of corporate accounts.

In response to the director's request regarding staffing, the petitioner provided an overview of the staffing in its New York office. The petitioner indicated that the New York office had a general manager, an office manager (the beneficiary's position), two supervisors and four travel consultants.

It is noted that the petitioner clarified that the beneficiary would be engaging in managerial duties under section 101(a)(44)(A) of the Act. As such, the decision is based on the criteria set forth under the managerial definition.

The director determined that the petitioner employed eight people, of which two were managers and that a travel agency of this size could not support two managerial positions. The director concluded that the beneficiary would not be engaged in managerial duties.

On appeal, counsel for the petitioner asserts that the beneficiary is managing the essential function of marketing on behalf of the petitioner. Counsel further cites several unpublished decisions and extrapolates from those decisions that the beneficiary meets the statutory definition of manager. Finally, counsel provides an updated organizational structure noting that two sales depots were inadvertently excluded from the previously submitted organizational structure. Counsel explains that an employee of the San Francisco office prepared the original organizational structure and failed to include the two sales depots in New Jersey as part of the New York office. Counsel notes that with the inclusion of the sales depots in New Jersey, the petitioner employs a general manager, an office manager (the beneficiary), an assistant manager, three supervisors, and eight travel consultants.

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 detailed position description for the beneficiary. The petitioner has also submitted position descriptions for the other positions in the company. However, counsel's assertion that the beneficiary is managing the essential function of marketing is not supported by the record. The description of the beneficiary's duties is indicative of an individual serving the marketing function rather than managing it. The petitioner's description of the beneficiary duties include coordinating marketing strategies, gathering information, and conducting marketing presentations, analyzing the Eastern USA market, deciding marketing strategies, preparing and marketing proposals, planning and developing sales strategies. The position descriptions provided for other staff of the petitioner do not indicate that other employees will be performing duties associated with marketing. Upon review of the complete record it is apparent that the beneficiary will be performing the necessary activities associated with the marketing function rather than managing this function through the work of others.

The petitioner's description of the beneficiary's duties outside the marketing arena does not comport with the statutory definition of a manager as interpreted by case law. The petitioner describes the beneficiary's duties as managing the inventory of air tickets, recording sales, training supervisors and consultants, verifying tour group contracts, negotiating contracts, collecting outstanding payments, managing purchases for office, and planning the contents of the web page. The description provided is again more indicative of a person performing the necessary activities of the enterprise rather than managing the enterprise through the work of others. 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). Counsel's reliance on unpublished decisions is misguided. The various unpublished decisions cited are not analogous to the case at hand. Moreover, unpublished decisions 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 had been established in the New York region since 1986. In considering the information provided on appeal, the petitioner employed three managers, three supervisors and eight consultants. As noted above, the job descriptions provided by the beneficiary do not reflect that the beneficiary is relieved of performing the day-to-day non-managerial functions of the company. Of further note, the petitioner did not provide a reporting hierarchy amongst its several employees. Based on the information submitted by the petitioner it appears that the reasonable needs of the petitioner have been met by individuals providing services to the company in primarily non-managerial roles. The petitioner has not established that the beneficiary is or will be employed in a primarily managerial role.

The record contains insufficient evidence to demonstrate that the beneficiary duties in the proposed position will be primarily managerial in nature. The description of the duties to be performed by the beneficiary in the position of office manager does not demonstrate the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial title. The petitioner has not established that the beneficiary will be employed in primarily a managerial capacity.

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.