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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 00 094 53168 Office: VERMONT SERVICE CENTER

Date: AUG 16 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

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 New Jersey and is engaged in international trade. 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 or that the petitioner could support such a position.

On appeal, counsel for the petitioner asserts that beneficiary has been and continues to be employed in a managerial capacity. Counsel also submits additional documents in support of this assertion.

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 petitioner established that the beneficiary has been and will be employed in a managerial 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.

The petitioner initially submitted an overview of the beneficiary's duties in the United States, its organizational chart and its Employer's Federal Quarterly Tax Returns for 1999. The petitioner also stated that it employed two permanent employees in addition to the beneficiary and used six individuals or firms to sell its products. The petitioner also indicated that it employed an accounting firm, a legal firm and warehousing and distribution firm.

The director requested that the petitioner submit its 1999 U.S. federal tax return and its quarterly tax returns for 1999 as of the filing date of the petition in February of 2000. The director specifically requested documentary evidence of how each employee was being paid.

In response, the petitioner submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Federal Tax Return for 1999. The Form 1120 showed a gross income of \$264,690, compensation of officers in the amount of \$45,000 and salaries paid in the amount of \$20,687. The Form 1120 also indicated \$6,550 paid in commissions, payment of \$600 for accounting purposes and \$350 for legal and professional services. The petitioner's IRS Form 941, Employers Quarterly Federal Tax Return reflected payment to the beneficiary of \$32,000, payment to the marketing manager of \$12,325 and payment to a secretary of \$11,180. The petitioner also provided copies of cancelled checks to the marketing manager of \$2,808 for the first two months of the year 2000. The petitioner also provided a copy of a cancelled check to an independent contractor for the month of January 2000 in the amount of \$300. The petitioner also submitted documentation in various forms of small payments made subsequent to the date of the petition's filing.

The director determined that payment made to subordinate employees for the year 1999 was not sufficient to demonstrate that these individuals were in managerial positions. The director further determined, based on the size and nature of the petitioner, that the beneficiary would not be engaged in managerial duties but rather in the non-managerial day-to-day operations involved in producing a product or providing a service.

On appeal, counsel for the petitioner asserts the beneficiary has been and continues to be employed in a managerial capacity. Counsel also asserts that the beneficiary supervises professional employees and gives the examples of the marketing manager, an individual with many years of experience in marketing and of professional independent contractors in the textile industry.

Counsel also notes the addition of three new employees but does not indicate when the employees were hired.

Counsel's assertion is not persuasive. It is noted that the petitioner is claiming that the beneficiary engages in managerial duties under section 101(a)(44)(A) of the Act. However, the record reveals that the beneficiary does not meet the criteria set out in this definition. The record does not support a finding that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. The petitioner's claim that the independent contractors and the marketing manager are professional employees is not supported in the record. 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). In addition, Section 101(a)(32) of the Act states that the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers. Further, the petitioner has not provided sufficient evidence to indicate that the "marketing manager" is a manager other than in title.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial capacity or that the beneficiary's duties will be primarily managerial in nature. The record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel or is managing an essential function of the organization. The petitioner has only provided evidence that two employees other than the beneficiary, and two independent contractors were employed or paid by it at the time the petition was filed. The petitioner did not provide the dates the additional three employees were hired and it appears from the record, that they were hired sometime after the petition was filed. 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Further, the petitioner has not provided adequate evidence of the independent sales representatives serving the petitioner on a full or part time basis in such a way that the beneficiary would be sufficiently relieved from performing the sales function herself. The petitioner has provided insufficient evidence to establish that the beneficiary is managing the sales function through the work of others rather than performing the function. Finally, the Service is not compelled to deem the beneficiary to be a manager simply because the beneficiary possesses a managerial title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial capacity.

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 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 five-year-old trading company that claimed to have a gross annual income of \$264,690. The firm employed the beneficiary as general manager, a "marketing manager," a secretary, and claims to have paid two independent sales contractors. The petitioner has not provided adequate supporting evidence that independent contractors were hired on a continuous and full-time basis. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Beyond the decision of the director, the petitioner has provided inconsistent statements regarding its ownership. The petitioner claims to be a wholly-owned subsidiary of an Indian foreign entity. Contrary to this claim, the record contains copies of the petitioner's tax returns that indicate the corporation is not a wholly-owned subsidiary and further represent that no foreign entity maintains an ownership interest in the company. The petitioner submitted copies of its IRS Form 1120, U.S. Corporation Income Tax Return, for the years 1997, 1998 and 1999. Schedule K of the Form 1120 states at line 4 that the company is not a subsidiary of any parent company or group, and further indicates at line 10 that no foreign person or corporation owns more than 25 percent of the company's stock. As the appeal is dismissed for the reasons stated above, this issue is not explored further.

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.