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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: WAC 00 116 52556

Office: CALIFORNIA SERVICE CENTER

Date: AUG 18 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, California 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 in April of 1997. The petitioner is engaged in the wholesale jewelry business. 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 performing the duties of an executive or manager.

On appeal, counsel for the petitioner asserts that the Service erred when making this determination.

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 for the United States enterprise.

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 petition contained the following description of the beneficiary's proposed duties for the United States enterprise:

He will perform in an executive capacity involving developing, directing, and managing the United States company, including planning, implementing long range goals and objectives. [The beneficiary] will be responsible for all operations. He will be responsible for setting up the plans, hiring the necessary employees, supervising the business and employees and overseeing them. He will develop new business and implement goals and politics [sic], and establish a receivable [sic] and collection system for the company.

The petitioner also included its 1998 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return showing gross receipts in the amount of \$249,085, taxable income in the amount of \$19,014 and salaries paid in the amount of \$37,200 and no compensation of officers.

The director requested additional documentation to establish that the beneficiary had been employed in an executive or managerial position in the United States. The director specifically requested a more detailed description of the beneficiary's duties and the percentage of time spent on each of the listed duties.

In response the petitioner re-submitted the description of the beneficiary's job duties that was submitted with the petition. The petitioner provided its organizational chart listing the beneficiary as president and an individual involved with sales and

marketing and an individual involved in administration and accounting. The petitioner indicated that the two employees implemented plans and objectives received from the president overseas. The petitioner also submitted its IRS Form 1120 for the year 1999. The 1999 IRS Form 1120 reflected gross receipts in the amount of \$352,957, taxable income in the amount of \$21,829, salaries paid in the amount of \$38,325 and that no compensation was paid to officers. The petitioner further submitted a copy of its California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for the first three quarters of the year 2000. The EDD Forms listed two employees, not including the beneficiary.

The director determined that the record did not demonstrate that the beneficiary would plan, organize, direct and control the organization's major functions by working through other managerial or professional subordinate employees. The director concluded that the petitioner had not established that the beneficiary had been and would be employed in the United States in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary meets all criteria set forth under the statutory definition of "executive." Counsel asserts that the petitioner requires a top-level executive to direct the company and establish the goals and policies of the organization as well as implement the policies of the organization. Counsel asserts that the Service has erred in thinking that the beneficiary is a first-line supervisor and states that "this is a case of a top-level executive where the number of employees supervised is not determination [sic]" and refers to an unpublished decision previously issued by the Administrative Appeals Office.

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 that refers, in part, to duties such as "setting up plans," and "supervising the business and employees and overseeing them." Furthermore the position description states that the beneficiary is responsible for "directing and managing the United States company," and "planning, implementing long range goals and objectives." This statement merely paraphrases certain elements of the statutory definition of "executive capacity" without describing the actual duties of the beneficiary with respect to the daily operations. The Service is unable to determine from these statements whether the beneficiary is performing executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

The job duties described by the petitioner are vague and too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. Counsel's assertion that the

petitioner has met all the criteria of the statutory definition of "executive capacity" 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 has erred in finding that the beneficiary is a first-line supervisor misinterprets the Service's determination. Further, counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the cited unpublished decision. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily executive or managerial capacity or that the beneficiary's duties 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 statutory definition of managerial or executive capacity. The description of the duties to be performed by the beneficiary does not demonstrate that 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 has managed 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 an executive title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

In addition, though the director did not comment on the beneficiary's employment abroad with the claimed overseas entity, the record contains insufficient evidence to establish that the beneficiary was employed in either an executive or managerial capacity for the overseas entity.

Finally, the record does not demonstrate that the petitioner has the requisite ability to pay the beneficiary the proffered wage of \$2,500 per month. The petitioner has not paid the beneficiary a salary of \$30,000 for either the year 1998 or 1999. The petitioner's 1998 and 1999 IRS Forms 1120 do not reveal that the petitioner had net income that was at least equal to the proffered wage. Further, the petitioner's IRS Forms 1120 do not reflect that the petitioner has sufficient net current assets to pay the proffered wage.

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.

As the appeal is dismissed for the reason stated above, these issues are not examined further.

ORDER: The appeal is dismissed.