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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



05 DEC 2002

File:

Office: VERMONT SERVICE CENTER

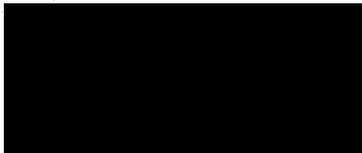
Date:

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

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center approved the immigrant visa petition. Upon subsequent review, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director served the petitioner with notice of his intent to revoke the approval of the preference visa petition, and ultimately revoked the approval of the petition on September 25, 2001. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New Jersey import and export corporation. It seeks employ the beneficiary as its sales manager and, therefore, endeavors to classify the beneficiary as a multinational executive or manager 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 revoked his approval of the petition on the basis that the proffered position is neither executive nor managerial in nature.

On appeal, counsel submits a brief. Counsel states, in part, that the beneficiary plays a critical role with the petitioning entity. 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.

In the initial petition filing, the petitioner described itself as an import and export business that employed seven individuals and had a gross annual income of \$2,000,000. According to the petitioner, the beneficiary had been employed as its sales manager since 1998 in L-1A nonimmigrant status. The proffered position of sales manager was described as follows:

1. Conducting market research and analysis and identifying potential customers.
2. Forming sales and marketing strategy and determining the

demands for products in US market.

3. Seeking US made [sic] goods to export to China and related US manufacturers on behalf of parent company, its subsidiaries or its customers.
4. Promoting products for parent company and its subsidiaries in US market.
5. Overseeing import & export business transactions between US and China.

In a subsequent letter to the director, the petitioner provided a different description of the proffered position. Instead of focusing on the beneficiary's marketing duties, the petitioner stated that the beneficiary assists the president in negotiating deals, signing contracts, allocating funds, developing business strategies, hiring employees and creating new product lines. According to the petitioner, the beneficiary also supervises individuals who perform research and analysis duties. In addition, the petitioner submitted an organizational chart of its operations, which indicated that the beneficiary managed the import and export departments and supervised four individuals.

The director found that the proffered position was primarily managerial in nature and he approved the petition. However, after further review of the record, the director concluded that he erred in reaching that decision. Specifically, the director stated that at the time the petition was filed, the petitioner employed only the beneficiary even though it had claimed to employ a president, a general manager and two sales persons. The director found the duties of the proffered position akin to the duties of a sales person, not a manager. For these reasons, the director revoked his approval of the petition after proper notice.

On appeal, counsel states that the beneficiary is uniquely qualified for the position based upon her experience, and that the petitioner has a bona fide need for the beneficiary's services.

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.

If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development. 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. 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).

The petitioner has not submitted credible evidence of its staffing levels. In the initial I-140 petition filing, the petitioner claimed to employ seven individuals, but it did not identify the individuals or their position titles. In an organizational chart that was submitted subsequent to the petition filing, the petitioner claimed to employ eight individuals. These eight individuals were identified as the president, the general manager, the manager of the business department (beneficiary), the manager of the management department, one assistant, and three salespersons. The petitioner claimed that only three of the eight individuals worked in the United States; the remaining five individuals worked in China. The petitioner's payroll documents for the year 2000 show that it paid wages to the beneficiary and four salespersons, three of whom worked on a contractual basis.

The petitioner has not presented a clear picture of its organizational structure. According to its payroll documents, the petitioner only employs the beneficiary and one other sales person and has a contractual agreement with three other salespersons. The petitioner has not explained why it claims to have an organizational structure that includes a president, a general manager, and a manager of management, when the payroll records do indicate that these individuals exist as employees of the United States entity.

Furthermore, the petitioner has never presented a consistent description of the duties associated with the proffered position. In the initial petition, the petitioner stated that the beneficiary was responsible for the company's market research duties. Later, the petitioner stated that the beneficiary's duties included assisting the president, supervising individuals who perform research and analysis duties, and managing two departments. The petitioner has not explained why it has submitted varying job descriptions for the beneficiary. Moreover, the job descriptions are not credible in light of the petitioner's organizational structure. As previously stated, there is no evidence that the petitioner employs a president; yet, the beneficiary allegedly assists the president with the daily operations of the company. Additionally, the beneficiary allegedly manages the import and export departments; however, the petitioner has not established that it is organized into departments.

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). The Service does not believe the facts that the petitioner has presented in this petition. There is no documentary evidence that the petitioner employs the eight individuals who are listed in the organizational chart. The petitioner cannot 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.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.