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Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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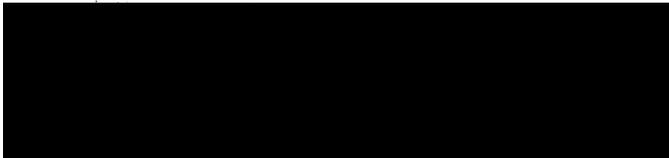
Office: TEXAS SERVICE CENTER

Date: **BEC 23 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, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in the import, export, and distribution of computers, components, and accessories. It seeks to employ the beneficiary as its general manager. Accordingly, it seeks to classify 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 would work in a primarily managerial or executive capacity for the United States company.

On appeal, counsel for the petitioner asserts that the Service incorrectly denied the petition.

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.

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 for the United States entity.

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 initially described the beneficiary's duties as follows:

[The beneficiary's] duties will include planning, developing and establishing policies and objectives of the business organization, as well as organizational policies to coordinate functions and operations of the company. He will direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns. [The beneficiary] will analyze financial and activity reports for the company's viability and financial status to then implement any changes he determines to be necessary. He will have full authority over the company's finances as well as personnel matters, including hiring and dismissals. [The beneficiary] will negotiate contracts on behalf of the company, and will act as its representative both legally and commercially.

The director requested additional details regarding the United States position of the beneficiary including the percentage of time spent on his various duties. The director also requested an organizational chart listing all employees by name and title and including a description of their duties.

In response, the petitioner stated that the beneficiary would oversee the activities of the United States company through reports provided by the managers under him including the purchasing and distribution manager, the administrator, and the warehouse manager. The petitioner noted that the warehouse manager and warehouse support staff had not yet been hired. The petitioner also re-stated the beneficiary's proposed duties and included a breakdown of his day-to-day duties as follows:

At least 50% [sic] of his time will be spent analyzing budgets and financial and activity reports prepared by management staff from the company's different departments, and using [sic] this information to evaluate the company's viability and financial status and its operating procedures, and recommend needed changes. He will also evaluate market studies and information on economic conditions in Latin America and use this information to evaluate and make changes to company priorities and objectives. He will consult with his managers as well as the foreign affiliate, and determine specific courses of action to be taken by the Company. He will delegate duties, supervise the implementation of his directives and give guidance to each according to his experience and knowledge.

He will negotiate contracts on behalf of the company, such as contracts for the sale or purchase of goods,

service contracts, and leasing agreements, and generally acts [sic] as its representative both legally and commercially. About twenty-five percent of his time will be spent on this types [sic] of activity.

[The beneficiary] will also have full authority over personnel matters, such as hiring staff, evaluating level, as well as determining salaries, bonuses, leaves of absence, promotions, reassignments or outright dismissals. He will directly supervises [sic] upper sales, warehouse, and administrative managers, who will report to him and provide evaluations and other information regarding the staff they supervise. About twenty-five percent of his time will be dedicated to these personnel matters.

The petitioner also provided its organizational chart depicting three current employees including a purchasing and distribution manager, an administrator, and a secretary. The purchasing and distribution manager position duties were described as selecting merchandise to be purchased, traveling to trade shows and manufacturers and Colombia, and supervising distribution.

The director determined based on the description of the purchasing and distribution manager duties that the position was not a managerial, supervisory, or professional position. The director concluded that the beneficiary would not be supervising and controlling the work of other supervisory, professional, or managerial employees. The director also determined that it appeared the beneficiary would be involved in a majority of the daily duties necessary for a small business. The director concluded that the petitioner had not established that the beneficiary would perform non-managerial or non-executive duties on an incidental basis.

On appeal, counsel for the petitioner asserts that the beneficiary will supervise a managerial employee and that the petitioner will be hiring additional managers, supervisors and professionals. Counsel also asserts that the beneficiary will not be making day-to-day decisions in terms of the warehouse, sales, purchasing, distribution, and marketing duties but will receive reports and manage the overall company. Counsel also cites an unpublished decision in support of his assertions.

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 provided a general description of the proposed duties of the beneficiary. In response to the director's request for evidence the petitioner expanded upon the beneficiary's duties by indicating that he would spend fifty percent of his time analyzing reports, evaluating marketing studies, consulting with others on

specific courses of action, delegating duties, and supervising the implementation of his directives. However, no evidence was submitted in support of this claim. The Service is not persuaded that the beneficiary will be primarily performing these duties in conjunction with managerial or executive duties rather than primarily performing the activities.

The petitioner also states that the beneficiary will spend about twenty-five percent of his time negotiating contracts and leases and acting as the representative of the company. Negotiating contracts and leases on behalf of the company in this case is more indicative of an individual performing the primary service of this company. 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). The petitioner has not provided evidence of other employees who will be performing this service for the company, thereby leaving the beneficiary to manage or oversee this service. Moreover, acting as the company's representative alone does not demonstrate that the beneficiary is an executive or manager.

The petitioner states that the remaining twenty-five percent of the beneficiary's time will be spent on personnel matters. However, as further discussed below, the petitioner has not established that the beneficiary will be supervising and controlling the work of other supervisory, managerial or professional employees.

Counsel's assertion that the beneficiary will supervise a managerial employee is not supported by the record. Counsel recites the description of the purchase and distribution manager's duties in an effort to convince the Service that the employee in this position manages an essential function of the company. However, based on the description of the sales and distribution manager's duties this employee is performing this necessary service for the petitioner, not overseeing or managing this service. Further, the petitioner has not clarified the primary duties of this position. It is not possible to determine based on the general description if the sales and distribution manager is primarily engaged in supervising others or, as the description appears to indicate, primarily traveling to find items to be purchased and presenting the merchandise to be sold. Neither counsel's assertion nor the petitioner's statement that temporary workers have been employed is 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 petitioner is a growing company and

is planning to hire additional managers, supervisors, and professionals does not contribute to a finding that the beneficiary will be acting in a managerial or executive capacity. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971).

Counsel has not explained how 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).

Finally, the petitioner has not provided a comprehensive job description that describes how the beneficiary will meet all four criteria set out in either the statutory definition of executive or the statutory definition of manager. The petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are general and fail to sufficiently describe his actual day-to-day duties. The description of the duties to be performed by the beneficiary does not sufficiently 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 adequately 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 an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

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.