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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 99 116 52463 Office: CALIFORNIA SERVICE CENTER

Date: JUL 11 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 preference 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 1996 and is engaged in the business of manufacturing and apparel trade. It seeks to employ the beneficiary as its vice-president. 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 functioned primarily in a managerial or executive capacity. The director also questioned whether the petitioner had established a qualifying relationship with a foreign entity.

On appeal, counsel for the petitioner provides explanations and supplemental evidence in an effort to overcome the issues raised in the director's decision.

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 first 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 statement submitted with the initial petition, the petitioner described the beneficiary's duties as vice-president in the following manner:

Set company policies and control the overall management of [the petitioner];
 Formulate and administrate company daily operation and develop long range goals for sales in the Northern America's market;
 Review analyses of activities, costs, operations, and forecast data in order to determine progress toward stated objectives;
 Confer with managerial personnel to review achievements and discuss required changes for management system;
 Direct and supervise managerial staff of the company, and evaluate their performance of assigned duties; and
 Receive the direction and supervision from the

President and Board of Directors.

The petitioner through a letter from its president stated that the beneficiary would be responsible "for directing the management of the corporation, for establishing the goals and polices of the organization, for contract negotiations, for hiring and firing of managerial personnel, and for the expansion of business and supervising day to day activities."

The petitioner also provided its organizational chart depicting a president, the beneficiary as vice-president and sales manager, a financial manager and a production manager. The chart also depicted two employees reporting directly to the beneficiary as sales manager.

The director requested additional evidence to establish that the beneficiary was acting in a managerial or executive capacity. The director specifically requested that the petitioner describe the duties of the president and to explain the need for four managers/executives in a company with twelve employees. The director further requested that the petitioner explain the beneficiary's activities in regards to visits to various retail outlets.

In response, counsel for the petitioner stated that the president of the company and the beneficiary as vice-president were two of six shareholders of the petitioner's parent company. Counsel further stated that the president and vice-president cooperate in overseeing the entire operation and each is responsible for all the functions related thereto. Counsel also provided a copy of minutes of a special meeting of the petitioner's directors that took place April 12, 1999. At the meeting the director's resolved that the parent company had acquired all of the petitioner's outstanding stock and that the beneficiary was elected president. The petitioner also submitted a declaration made by the beneficiary wherein the beneficiary stated that:

Since April 12, 1999 I have been appointed the President of [the petitioner] and as such I am responsible for all the functions of the operation including managing day-to-day operation of [the petitioner]. In such capacity and even when I was the Vice-President of [the petitioner], I traveled and meet [sic] our major customers throughout the United States, negotiating with the financial concern for acceptance and issuance of letters of credit and meet [sic] regularly with the officers and directors to formulate strategy and direction of [the petitioner] and coordinate with [an alleged sister company] to assure that all bases would be covered; that all production would be on schedule; that all our customers would be protected from 'slave labor' allegation if we fail to

properly monitor our subcontractors.

The director determined that the petitioner had failed to establish that the beneficiary was engaged as an executive or manager.

On appeal, counsel for the petitioner asserts that the beneficiary as president is accountable for the overall operation and each function of the petitioner. Counsel submits a revised organizational chart as of April 12, 1999 depicting the beneficiary as president of a company with twelve employees. Counsel also asserts that the petitioner has overall management responsibility over subcontractors that employ over one hundred employees.

It is noted that neither counsel nor the petitioner clarifies whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act or executive duties under section 101(a)(44)(B) of the Act. 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, 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 case at hand the petitioner's description of the job duties is not sufficient to warrant a finding that the beneficiary's position is a managerial or executive in nature. The description of job duties is vague and general in nature. In the initial petition, the petitioner refers, in part, to duties such as setting company policies, controlling the overall management of the petitioner, administering the company's daily operation, developing long range goals, reviewing analyses and conferring with managerial personnel. Furthermore, the petitioner states that the beneficiary is responsible "for directing the management of the corporation, for establishing the goals and policies of the organization." This statement merely paraphrases 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 managerial or executive duties with respect to the activities or whether the beneficiary is actually performing the activities.

The petitioner in response to the request for evidence states that after the petition was filed the beneficiary was appointed president. The beneficiary then provides a general description of his duties as president, including responsibility for all the functions of the operation including meeting with major customers and negotiating with financial concerns. It appears from the beneficiary's own description that his daily activities as

president include performing basic operations for the petitioner. In addition, it must be noted that the beneficiary's new position cannot be used to establish eligibility at the time of filing the position. A petitioner must establish eligibility at the time 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). At the time of filing the petition, the beneficiary was identified as the sales manager and a vice-president. As noted above, the position description submitted for the beneficiary at the time of filing did not provide a comprehensive description of the beneficiary's daily activities.

Counsel's assertions that the beneficiary is accountable for the overall operation and function of the petitioner and has management responsibility over a number of subcontractors 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).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive 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.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with an overseas entity.

The director noted in her request for additional evidence that the petitioner had presented a stock certificate issued by the petitioner and identified as Certificate number 2 with this petition. The director also noted that the same petitioner in a previously filed petition for the same beneficiary had presented

a stock certificate issued by it and also identified as Certificate number 2. Although the director noted that the number of shares issued in both certificates was the same and issued to the same party, the director requested an explanation regarding the inconsistency of issuing dates. Counsel for the petitioner suggested that perhaps the discrepancy was due to a typographical error or perhaps the original immigration consultant had obtained an undated copy from the petitioner and had arbitrarily placed a date on it. The director did not find this explanation convincing and noted a further discrepancy in that the information on one stock certificate was typed using all capital letters and that the other was typed in lower case letters. The director concluded that the record raised questions as to whether the record was sufficient in establishing a qualifying relationship between the petitioner and the foreign entity.

On appeal, counsel for the petitioner declines to speculate further on the inconsistencies between the two stock certificates. At the request of counsel, the petitioner submits a statement purportedly signed by the seven directors of the petitioner's purported parent company stating that the parent company is the holding company of one hundred percent of the petitioner.

Upon review, the statement submitted by the petitioner is not persuasive in establishing its ownership and control. The two distinctly different stock certificates identified as evidence of the one transfer of ownership to the alleged parent company continues to raise serious concerns regarding the ownership and control of the petitioner. The statement by the purported owners of the claimed parent company does not adequately alleviate this concern. 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 (BIA 1988). The petitioner has not offered independent objective evidence in an effort to explain this inconsistency. For this additional reason, the petition may not be approved.

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.