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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: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 11 2002

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 importing and exporting frozen foods. 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 as an executive or manager.

On appeal, counsel for the petitioner asserts that the beneficiary is a functional manager and executive.

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.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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.

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 was incorporated in the State of Florida in May 1997. It is a wholly owned subsidiary of a Colombian corporation. The petitioner provided a description of the beneficiary's proposed job duties in its offer of employment stating that:

[The beneficiary] will implement his own marketing strategies, which include, appearances at trade shows and conventions, where fast-food chains, supermarkets, and restaurants may sample [the foreign entity's] food specialties. He will continue to open markets in the United States, initially in New York, Houston, San Antonio, San Diego, Puerto Rico, and islands in the Caribbean such as, the Virgin Islands, the Bahamas, and the Caymans. In addition, [the beneficiary] will oversee the transportation of goods from Colombia to the United States, as well as all shipping and proper handling of food within the United States. He will continue to oversee the day-to-day operations of the Miami office while maintaining close contact with [the foreign entity] in Colombia. He will also play a vital role in determining levels of production, production of specific product lines, pricing and distribution in the United States and the Caribbean.

The petitioner also included copies of its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998. The 1998 IRS Form 1120 reflected gross receipts of \$111,393, compensation of officers in the amount of \$60,000 and salaries paid in the amount of \$13,000. The petitioner also provided IRS W-2 Wage and Tax Statements for the year 1998, reflecting wages paid to two employees, the beneficiary in the amount of \$60,000 and another individual in the amount of \$13,000.

The director requested additional evidence including additional details regarding the daily duties of the beneficiary in the proposed position, evidence of wages to paid to all employees, an organizational chart of the company listing all employees by name and title and evidence of the employment of contract workers if such workers were used by the petitioner.

In response, the petitioner through its counsel re-stated much of the description of beneficiary's job duties provided in the offer of employment. The petitioner noted that the beneficiary currently devoted about 50 percent of his time to sales and marketing. Counsel for the petitioner also stated that the beneficiary had exclusive authority to direct the day-to-day operations of the company and devoted approximately 30 percent of his time to overseeing the company's financial transactions,

formulating employment policies including hiring and firing and setting levels of production. Counsel for the petitioner further stated that the beneficiary was overseeing and managing shippers, preparing and analyzing declarations, insurance contracts and was arranging local transportation.

Counsel also noted that the petitioner employed an administrative assistant and a driver-salesman in addition to the beneficiary. The petitioner provided its 1999 IRS W-2 Forms reflecting wages paid to the beneficiary in the amount of \$60,000, wages paid to the administrative assistant in the amount of \$13,889 and wages paid to the driver-salesman in the amount of \$2,649.83. Counsel stated that the petitioner did not make use of contract workers.

The director determined that the beneficiary appeared to be performing a majority of the duties associated with an import and export business and concluded that the beneficiary was not primarily functioning in an executive or managerial capacity.

On appeal, counsel for the petitioner asserts that although the beneficiary does not directly manage professional subordinates, he is the senior level person in the United States organization and is responsible for expanding, organizing, directing and developing the company's capabilities. Counsel also contends that it is important to consider that the petitioner is a relatively new business and that it has been necessary for the beneficiary to be more actively involved in the day-to-day operations. Counsel notes that the petitioner has made it clear that the beneficiary plans to hire additional staff and that the beneficiary does have wide latitude to make decisions about the organization. Counsel finally asserts that the beneficiary is an executive in that he directs the management of the organization, establishes all goals and policies of the organization and has complete discretion in decision making with only general supervision or direction from executives abroad. Counsel concludes that the beneficiary is a functional manager and executive.

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). The petitioner's description of the beneficiary's job duties and responsibilities is more indicative of an individual who is performing the necessary tasks associated with importing and exporting products. 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). Counsel's request that the Service consider that the petitioner's business is relatively new and that the petitioner plans to hire additional staff is injudicious. 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). Counsel's paraphrasing of elements of the statutory definitions of manager and executive also cannot contribute to a finding that the beneficiary is operating in a managerial or executive capacity. Such statements do not provide the necessary detail to establish the daily activities of the beneficiary in his employment with the petitioner.

Counsel's conclusion that the beneficiary is a functional manager and executive is also without merit. Again, the descriptions provided by the petitioner and counsel indicate that the beneficiary is primarily performing the import, export and marketing functions of the petitioner as opposed to primarily directing or managing those functions through the work of others.

The record reveals that at the time of filing the petition, the petitioner did not have a staff sufficient to relieve the beneficiary from performing non-qualifying duties. The petitioner through its counsel states that it employed only the beneficiary and an administrative assistant and what appears to be a part time driver-salesperson. The petitioner indicates that it does not use the services of contract employees. At the time of filing, the petitioner was a two-year old import and export company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioner require a manager or executive as defined by the regulations and case law. As noted above, the record does not sufficiently demonstrate that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature rather than the performance of services necessary to continue the operation of the company.

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 in the proposed position will be primarily managerial or executive in nature. The description of the beneficiary's job duties is more indicative of an individual primarily performing the necessary tasks of the petitioner. In addition, a portion of the position description serves to merely paraphrase the statutory definition of managerial or executive capacity. The petitioner admits that the beneficiary does not manage a subordinate staff of professional, managerial or supervisory personnel and fails to establish that the beneficiary manages an essential function. Further, the record does not sufficiently establish that the beneficiary will be directing the management of the organization or a function of the organization. The Service is not compelled to deem the beneficiary to be a manager or an executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary has been or will be acting in 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.