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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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File: [Redacted]

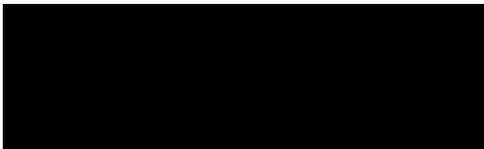
Office: TEXAS SERVICE CENTER

Date: JUL 22 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 preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the state of Texas in March of 1995. The petitioner is engaged in business development and management. 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 engaged in a primarily managerial or executive position with the foreign entity and would not be engaged in a primarily managerial or executive position with the United States entity.

On appeal, counsel asserts that the beneficiary meets the statutory definition of multinational manager and executive and that the Service misapplied the federal statute.

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.

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 letter submitted with the initial petition, the petitioner described the beneficiary's duties as follows:

[The beneficiary] is currently serving as the Vice President of [the petitioner]. Our company needs [the beneficiary] to continue in this vital role. In this capacity, [the beneficiary] meets with corporate representatives of companies in the United States and Mexico to evaluate their initial business plans, expansion plans and implementation schedules. [The beneficiary] prepares feasibility reports based on current market conditions and makes recommendations to management. [The beneficiary] is responsible for overseeing the preparation of market research reports and surveys to determine how Mexican and U.S. companies can expand their business in the two countries.

[The beneficiary] oversees industry research to determine the appropriate support levels for

maintenance and expansion of business operations. He analyzes existing distribution networks in Mexico and the United States, makes recommendations for modifications to streamline procedures, maximize efficiency, productivity, and profitability. [The beneficiary] prepares implementation plans for changes in policy and procedure.

In a "memorandum of law" signed by the petitioner's counsel, counsel added that:

[The beneficiary] meets the criteria for "executive capacity" as he was employed in an executive capacity with [the foreign entity] from October 1994 to December 1996 as the Financial Controller and Strategic Director.

[The beneficiary] meets the criteria for "executive capacity" as he is currently employed in an executive capacity by the U.S. company affiliate as the Vice President-Operations. [The beneficiary] has held this position continuously from January 1997 to the present. [The beneficiary] oversees corporate finance, budgeting and income projections. [The beneficiary] has executive level discretion regarding financial operations. [The beneficiary] reports directly to the Executive Vice President of [the petitioner].

[The beneficiary] will continue to meet the criteria for "executive capacity" serving as the Vice President-Operations of [the petitioner]. In this capacity, [the beneficiary] will continue to serve as the primary finance officer. [The beneficiary] will oversee the finance department and has executive level discretion regarding financial operations. This meets the requirement of "an assignment within an organization in which the employed primarily: (A) Directs the management of the organization or a major component or function of the organization; . . .

The petitioner also provided an organizational chart depicting a vice-president of sales and marketing, the beneficiary as chief financial officer and chief operating officer, an office manager reporting to the beneficiary and a sales manager and merchandiser. The sales manager is depicted as reporting to both the vice president of sales and the beneficiary.

The petitioner further provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the years 1997 and 1998. The 1997 IRS Form 1120 revealed gross receipts in the amount of \$669,642, that no compensation had been paid to officers and salaries had been paid in the amount of \$212,374 for that year. The 1998 IRS Form 1120 revealed gross receipts in the

amount of \$735,748, compensation paid to an officer (the vice president of sales and marketing) in the amount of \$149,153 and salaries paid in the amount of \$144,647 for the year.

The petitioner further provided IRS Form 941, Employer's Quarterly Federal Tax Return for the quarters ending in March, June, September and December of 1998. The Form 941 reflected nine employees for the quarter ending in March, eight employees in the quarter ending in June, four employees in the quarter ending in September and six employees in the quarter ending in December of 1998.

The petitioner also provided the organizational chart for its parent company depicting six employees and noting the beneficiary was employed as the comptroller.

The director requested additional details regarding the beneficiary's foreign position including his daily duties and additional details regarding the beneficiary's United States position including his daily duties, the number of people he supervised and their titles and daily duties.

In response, the vice-president of the petitioner provided a letter stating that the beneficiary's duties for the foreign company were as follows:

His daily duties were finance and accounting, in addition to that he was in charge of developing strategic studies for our clients, feasibility analysis and economic soundness of different prospects.

In Mexico he supervised two people plus four temporary employees.

The titles of the two persons working for him were Logistics and Distribution and Assistant.

The vice-president also included the following description for the beneficiary's position with the petitioner:

[The beneficiary's] daily duties at [the petitioner] are finance, accounting, logistics, distribution and economic and market studies and analysis. [The beneficiary] evaluates clients' initial business expansion plans and implementation schedules. He is responsible for overseeing the preparation of market research reports and surveys to determine how Mexican and US companies can expand their business into the two countries.

The director determined based on the evidence submitted that the beneficiary had been primarily performing daily duties associated with the finance and accounting departments of the foreign

company. The director also determined that the beneficiary was currently performing a majority of the daily duties associated with the daily business of the United States company. The director further determined that the beneficiary was not supervising managerial, supervisory, or professional employees. The director concluded that as the beneficiary had been performing the day-to-day functions of the foreign company and would be performing the daily functions of the United States company, he had not been functioning in an executive or managerial position for either company.

On appeal, counsel for the petitioner re-states the previous descriptions for the beneficiary's job position. Counsel also asserts that the beneficiary uses his executive level discretion to build the petitioner's business even though he does not supervise a large number of people. Counsel questions the Service's use of staffing levels without taking into consideration the overall purpose of the organization. Counsel also references definitions found in the Dictionary of Occupational Titles for vice-president and comptroller. Counsel also includes a brochure for a company that also employs three of the same individuals as the petitioner, although the employees' titles, save for the beneficiary, have changed. The company name on the brochure is also different than the name of the petitioner. Counsel offers this brochure as evidence "the Beneficiary oversees 4 employees who control the respective areas of their positions within the Petitioner's company."

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 job duties is not sufficient to warrant a finding of managerial or executive job duties. In the initial petition, the petitioner submitted a broad position description that vaguely refers, in part, to duties such as "oversees industry research," "analyzes existing distribution networks," and "prepares implementation plans." Counsel's additional statement that the beneficiary "oversees corporate finance, budgeting and income projections" is likewise vague. These statements are too vague and general to convey an understanding of what the beneficiary will be doing on a daily basis. The petitioner's response to the director's request to provide additional details regarding the beneficiary's daily duties is insufficient. The petitioner only named several areas that the beneficiary worked in, such as finance, accounting, logistics and analysis, still not communicating what the beneficiary was or would be doing on a daily basis in these areas. In addition, several of the statements the petitioner used to generally describe the beneficiary's duties are more indicative of an individual performing services for the company rather than directing or managing the company. For example, the petitioner refers to the beneficiary "evaluate[ing] client's

initial business expansion plans," and "preparing implementation plans," and "analyzing existing distribution networks." 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). Further, the petitioner references the beneficiary overseeing the preparation of market research reports and surveys and overseeing industry research but the petitioner does not provide documentation regarding who, other than the beneficiary, is accomplishing these tasks. 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 reference to the Dictionary of Occupational Titles and the Occupational Outlook Handbook without an underlying comprehensive description of the beneficiary's duties is without merit. Neither counsel nor the petitioner offers a description of the beneficiary's duties that would allow the conclusion that the beneficiary's position is primarily executive or managerial in nature.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a five-year-old company engaged in business development and management. The firm employed a vice-president in charge of sales and marketing, the beneficiary as vice-president of operations and chief financial officer, an office manager, a sales manager and a merchandiser. The petitioner did not provide any description of the duties of employees other than the beneficiary. Based on the position titles provided the petitioner employs four managerial employees and a "merchandiser." It does not appear that that the reasonable needs of the petitioning company might plausibly be met by the services of four "managerial" employees and a merchandiser. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Of significant concern is the brochure provided by counsel to evidence that the beneficiary is acting in an executive capacity.

The brochure indicates that a company other than the petitioner now employs the beneficiary, the vice president of sales and marketing, and the sales manager. The petitioner has provided no documentation to demonstrate that it has changed its name and employs individuals in capacities different than those described in the initial petition. Furthermore, although the petitioner filed this petition in July of 2000, the petitioner did not provide its 1999 IRS Form 1120. The lack of this information and the divergent details regarding the petitioner, its employees, and another company raises serious questions regarding the validity of the petitioner. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, 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 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. 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 an 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.

Finally, the petitioner did not submit evidence to establish that the beneficiary had been employed by the claimed parent company abroad in a managerial or executive capacity. Although the petitioner stated that the beneficiary had been employed by the claimed parent company as comptroller, the petitioner did not submit evidence adequate to support this claim. The beneficiary's duties for the claimed parent company were not comprehensively described. The Service is unable to determine from the broad description provided whether the beneficiary was performing managerial or executive duties with respect to his duties as comptroller or whether the beneficiary was actually performing the activities.

The petitioner has not established that the beneficiary was



performing in a primarily managerial or executive capacity for the foreign entity and has not established that the beneficiary has been or will be employed in either a primarily managerial or executive capacity for the United States entity.

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.