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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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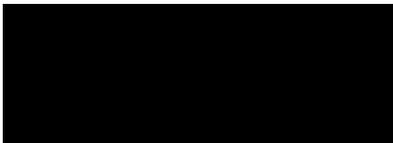
File: WAC 00 012 50984 Office: CALIFORNIA SERVICE CENTER

Date: JUL 25 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, California 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 California in April of 1995. The petitioner is engaged in the promotion and marketing of its claimed affiliated Mexican company. 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 worked as an executive and manager for the Mexican entity and that the beneficiary runs the petitioner thereby meeting the statutory definition of multinational 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.

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 performed managerial or executive duties for the foreign entity during the requisite time period.

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 described the beneficiary's duties for the claimed foreign affiliate as its general director of operations from May of 1994 until his transfer to the petitioner in 1996 as follows:

He was responsible for the day to day management and operation of the business. He was responsible for the hiring, firing and directing the activities of all personnel. He exercised discretion over all projects undertaken by the company. He directly negotiated or oversaw the negotiation of all business contracts the company engaged itself in and exercised ultimate discretion over their acceptance or rejection. As part of his functions, and in exercising his discretion over the important decisions affecting the company, [the beneficiary] consulted with outside professionals, such as attorneys and accountants in order to determine and implement the most propitious corporate policy.

The director requested additional evidence to establish that the beneficiary had been performing the duties of a manager or executive with the foreign entity. The director specifically requested the foreign company's organizational chart including the beneficiary's position with the foreign company and all employees under the beneficiary's supervision. The director also requested that the petitioner submit a more detailed description of the beneficiary's duties abroad including the percentage of time the

beneficiary spent on each of the listed duties.

In response, the petitioner provided the foreign entity's organizational chart depicting a sole administrator over six divisions of the foreign company. The beneficiary was not depicted on the chart nor was the beneficiary's position of general director of operations. The petitioner explained that the beneficiary's duties for the foreign company were limited as the beneficiary had been in the United States on an L-1A visa since December of 1996. The petitioner provided the same description of the beneficiary's duties for the foreign entity prior to his entry into the United States as had been provided with the petition.

The director determined that the petitioner had not provided sufficient information to establish that the beneficiary had been working for the foreign entity as a manager. The director noted that neither the beneficiary nor the beneficiary's position was depicted on the foreign entity's organizational chart.

On appeal, counsel for the petitioner provides the same description of duties performed by the beneficiary for the foreign entity as previously provided. Counsel explains that the organizational chart submitted in response to the director's request for evidence is based on the organizational structure of the entity after the beneficiary had transferred to the petitioner. Counsel notes that the request for evidence was couched in the present tense and thus the response focussed on the current structure of the foreign entity. Counsel asserts that evidence submitted in support of the beneficiary's L-1A visa petition in 1996 and again in 1999 documented the beneficiary's managerial and executive role with the foreign entity and should lead to the same conclusion with this petition.

Counsel's assertion is not persuasive. The description of the beneficiary's job duties is not sufficient to warrant a finding of managerial or executive job duties for the foreign entity. The description of job duties is vague and general in nature, essentially serving to paraphrase certain elements of the statutory definition of managerial and executive capacity. No concrete description is provided to explain what the beneficiary did in the day-to-day execution of his position as general director of the foreign entity. The petitioner has not submitted sufficient evidence to establish that the beneficiary actually conducted the broadly cast description of his duties. Although the director's request for additional evidence is ambiguous in part, the regulations specifically require evidence to establish that an alien 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, was employed by the entity abroad for at least one year in a managerial or executive capacity. In the case at hand, the petitioner has not provided a sufficient description of the beneficiary's duties for

the foreign entity to establish this essential element.

Counsel's reliance on past approvals of L-1A visa petitions is injudicious. Each petition is adjudicated based on the record of proceeding and the record of proceeding must contain all the required evidence. This record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. Furthermore, if the previous nonimmigrant petition was approved based on the same general description that was provided in this petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Enqq. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988). The record is insufficient to establish that the beneficiary worked in a managerial or executive position for the foreign company during the requisite time period.

The second issue in this proceeding is whether the beneficiary will perform executive or managerial duties for the petitioner.

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). The same statutory definitions of managerial and executive capacity as noted above apply.

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

As president and managing director of [the petitioner][the beneficiary] has full responsibility for the direction and management of the entire company. He is responsible for the day to day management and activities of the corporation and the formulation and implementation of corporate policy. He is responsible, directly or through subordinate managerial staff, for the supervision and direction of the activities of all personnel as well as their hiring, firing, promotion and retention. He is also responsible for exercising discretion and making all decisions in matters relative to the financial well-being [sic] of the company and the investments it undertakes. He reports directly to the Board of Directors, of which he a member, and to the sole shareholder.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1998. The 1998 IRS Form 1120 revealed gross receipts in the amount of \$561,190, compensation paid to an officer (the beneficiary) in the amount of \$65,215 and salaries paid in the amount of \$61,124 for the year. The petition noted that the petitioner employed eight individuals.

The director requested a copy of the previous denial notice for the I-140 petition submitted by the petitioner on behalf of the beneficiary in 1997.

In response, the petitioner provided a copy of the previous denial notice and explained that the 1997 petition had been denied because the petitioner could not establish its ability to pay the proffered salary to the beneficiary. The petitioner also provided its 1999 IRS Form 1120 showing gross receipts in the amount of \$563,916, compensation paid to the beneficiary as an officer in the amount of \$62,058 and salaries paid in the amount of \$109,315. The petitioner further provided its organizational chart depicting the beneficiary as president, and positions for the secretary of the corporation, the sales coordinator, the assistant administrator, the clerical person and the janitorial/U.S. runner person. The chart also showed an outside accounting advisor and two positions in an auto body repair unit. The petitioner noted on the chart that all employees, except the auto body repair employees reported to the beneficiary.

The director determined based on the organizational chart submitted that the beneficiary was not supervising positions that were managerial, supervisory or professional in nature. The director concluded that the petitioner had not established that the beneficiary was a manager for the United States company.

On appeal, counsel for the petitioner re-states the previous description for the beneficiary's job position. Counsel asserts that the beneficiary "directs the entire organization" and that "as a board member is accountable only to the sole shareholder." Counsel also asserts that the beneficiary "has full responsibility for the direction and management of the entire organization," and that "he manages not one, but every essential function of [the petitioner]." Counsel concludes that the beneficiary satisfies both the definitions of a manager and an 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 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 which vaguely refers, in part, to duties such as "day to day management and operation of the business," and

"exercise[ing] discretion over all projects to be undertaken," and "exercise[ing] his discretion over important decisions affecting the company." These statements are too vague and general to convey an understanding of what the beneficiary will be doing on a daily basis. 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. In addition, several of the beneficiary's responsibilities 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 "negotiate[ing] or over[seeing] negotiations of all business contracts," and the "day to day management and operation of the business." These statements indicate that the beneficiary is performing the day-to-day tasks that are necessary to keep the petitioner in business. 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, supra at 604.

Counsel's assertions that the beneficiary "directs the entire organization," and that "he manages not one, but every essential function of [the petitioner]" are without merit. 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). Neither counsel nor the petitioner has provided documentary evidence to support a finding that the beneficiary is acting in either a managerial or executive capacity. 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. 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 or will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established its affiliate relationship with the overseas entity. The petitioner explains that a Mexican company originally owned 100 percent of its shares. The petitioner in response to the director's request for additional evidence noted that a transfer of its shares had taken place in 1998. The petitioner explained that this transfer resulted in an affiliate relationship between the Mexican company and itself. The petitioner provided copies of the organizational minutes wherein 1000 share of common stock was authorized. The petitioner also provided copies of stock certificates and its stock ledger showing 1000 shares of its stock was initially issued to the Mexican foreign entity in this case. Subsequently the 1000 shares issued to the Mexican company were transferred to the beneficiary and to an individual identified as the beneficiary's wife in 500 share portions. The petitioner alleges that because the Mexican company is also owned by the beneficiary and his wife, each owning 45 percent of the company, that an affiliate relationship exists. However, the petitioner and counsel and the petitioner's 1998 and 1999 IRS Form 1120s indicate that the petitioner is 100 percent owned by the beneficiary. The petitioner has provided inconsistent information regarding its ownership. 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). Further, 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. Because the appeal is dismissed for the reasons stated above, this matter is not examined further.

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.