



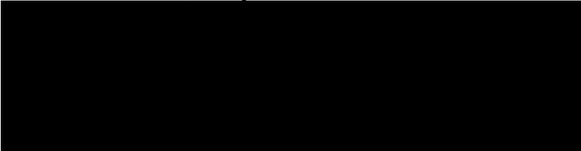
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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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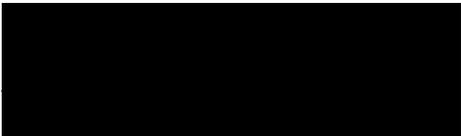
File: WAC 99 052 50085 Office: CALIFORNIA SERVICE CENTER

Date: 25 JUL 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 was appealed to the Associate Commissioner for Examinations. The Associate Commissioner dismissed the appeal as no brief was submitted detailing the purported errors of the Service decision. The matter is now before the Associate Commissioner on a motion to reconsider. The motion is granted. The appeal will be dismissed.

The petitioner is a corporation organized in the state of California in August of 1989. The petitioner is engaged in the wholesale trading of arts and crafts. 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 was engaged in a primarily managerial or executive position.

On motion, counsel asserts that the Service's decision was arbitrary, was based on erroneous assumptions and that the evidence submitted in support of the petition was ignored.

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:

As the General Manager of this company, the beneficiary will direct and coordinate activities of the petitioner to obtain optimum efficiency and economy of operations and maximize profits.

In addition, he will plan and develop organization policies and goals, and implement goals through subordinate administrative personnel. Furthermore, he has to analyze division budget requests to identify areas in which reductions can be made, and allocate operating budget. [The beneficiary] will confer with administrative personnel, and review activity, operating, and sales reports to determine changes in programs or operations required. Most of all, he will

promote [the petitioner] within the local industry and trade associations.

He has to review the performance evaluation of departmental personnel, and has the authority to hire and fire personnel. . . . he will be in charge of ambitious expansion plans that are currently being undertaken by [the petitioner].

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1997. The Form 1120 revealed gross receipts in the amount of \$457,080, that no compensation had been paid to officers and that no salaries or wages had been paid for that year. The petitioner also included an unaudited statement of income for the 1997 calendar year reflecting salaries paid in the amount of \$63,400.

The petitioner further provided IRS Form 941, Employer's Quarterly Federal Tax Return for the quarters ending in March, June and September of 1998. The Form 941 reflected three employees for the quarter ending in March of 1998 and four employees in the quarters ending in June and September of 1998. The petitioner also included its organizational chart depicting a president, the beneficiary as general manager, a chief financial officer, a secretary and two sales representatives and an accountant. The petitioner did not provide documentation evidencing the employment of the sales representatives and accountant.

The director determined that the petitioner had failed to establish that the beneficiary was engaged as an executive or manager. The director determined that an international trade company would not require the use of professional employees and that the record reflected that the petitioning entity operated on a small scale. The director concluded that the beneficiary would be employed only as a first-line supervisor and would also be involved with the day-to-day non-supervisory duties of a small import/export company.

On appeal, counsel for the petitioner asserts that the director's conclusion that the international trade or import/export industry does not use professional employees is arbitrary. Counsel also asserts that the Service arbitrarily concluded that the beneficiary had to be a first-line manager performing non-qualifying duties based solely on its view of the international export and import industry. Counsel contends that the director ignored that the beneficiary had been and would be supervising the work of other professional employees and managers, such as the chief financial officer and an accountant. Counsel further asserts that the director's assumption that the executive or managerial capacity of a position is a function of the company's size is in error.

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 "direct[ing] and coordinate[ing] activities of the petitioner to obtain optimum efficiency and economy of operations and maximize profits," and "analyze[ing] budget requests," and "confer[ring] with administrative personnel." Furthermore, the position description states that "he will plan and develop organization policies and goals, and implement goals through subordinate administrative personnel." This statement merely paraphrases certain elements of 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 broad statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

The job duties described by the petition are vague and too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. The petitioner's statement that the beneficiary will most of all promote the petitioner within the local industry and trade associations and be in charge of expansion plans is more indicative of an individual performing basic operations of the petitioner rather than managing or directing them. 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).

Although the director based her 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 nine-year-old company trading in arts and crafts that claimed to have a gross income of \$457,080. The firm employed a president, the beneficiary as general manager, a financial officer and a secretary. As noted above, the petitioner did not provide documentation substantiating the employment of an accountant and sales representatives. 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). Based on the record, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of three "managerial" employees and one secretary. 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.

In addition, the 1997 IRS Form 1120 and the unaudited financial statement for 1997 provide grossly different figures regarding salaries paid by 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).

Further, regarding the professional nature of the employees allegedly supervised by the beneficiary, the petitioner has not provided supporting documentation to establish the duties and responsibilities of the chief financial officer and has not provided any evidence that an accountant was employed by the petitioner. As noted above, simply stating that the petitioner employs an individual or that an individual by virtue of their title is a professional without supporting documentary evidence is not sufficient. Matter of Treasure Craft of California, supra.

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 do 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.

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.