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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 99 195 51590

Office: CALIFORNIA SERVICE CENTER

Date:

25 JUL 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 preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation that was organized in California in November of 1995. The petitioner is engaged in the distribution and wholesale of audio cassettes, CD boxes, CD-Rs, C-Zeros, and toys. It seeks to employ the beneficiary as its vice-president and quality control manager. Accordingly, the petitioner endeavors to classify 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 or would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the Service failed to properly apply the law to the facts and incorrectly concluded that the beneficiary would not be acting in an executive or managerial capacity.

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.

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 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 initially stated the beneficiary's proposed duties for the United States entity as follows:

[The beneficiary] will assist the President in overall operation of the company. In addition, he will be mainly in charge of the Quality Control Department of the company. He will be responsible for formulating and establishing product assurance program [sic] to prevent or eliminate defects of imported products from

Hong Kong. He will supervise and direct technical support staff in analyzing and solving technical problems, and providing quality maintenance services to customers. He will also confer with engineers in China and Hong Kong about quality assurance of new products designed and manufactured products on market to rectify problems. In addition, he will guide and instruct technical staff to stay abreast of technical developments in industry, and meet changing market opportunities in the United States. Furthermore, he will coordinate functions and operations between departments, and assist the managerial group in attaining business objectives.

The petitioner also included its organizational chart listing a president, the beneficiary as the vice-president, a sales and marketing manager, a financial manager, and the beneficiary also as the head of the quality control department. The organizational chart also listed positions for a sales representative, a technician, and an accounting/bookkeeper. The petitioner also included its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return for 1997 and 1998.

The director requested additional evidence including a specific day-to-day description of the duties the beneficiary had performed. The director also requested a list of all the employees under the beneficiary's supervision and direction as well as all of the petitioner's employees by name and job title. The director further requested copies of the company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for 1999 and the petitioner's IRS Form 1120 for 1999.

In response the petitioner provided the following information regarding the beneficiary's duties:

[The beneficiary's] proposed position is that of Vice President and Manager of the Quality Control Department. This proposed position qualifies as a managerial position, for the following reasons: (a) [the beneficiary] will be managing the quality control department, and will be responsible for instituting product assurance programs to eliminate or minimize defects in imported products; (b) [the beneficiary] will be supervising, through his position as vice president, the work of other supervisory and managerial employees, namely the managers of the Sales and Marketing Department, and the Financial Department; and (c) [the beneficiary] has the authority to recommend personnel actions with respect to the employees that he supervises.

The petitioner also provided its California EDD Forms for the quarters ending March 31, 1999 through September 30, 2000. The

California EDD Forms for all quarters except three reflected that the petitioner employed four individuals. The quarters ending March 31 and June 30, 1999 reflected three employees and the quarter ending September 30, 1999 reflected five employees. The 1999 IRS W-2 Forms, Wage and Tax Statement confirmed five employees worked for the petitioner in 1999, although one employee was paid salary of only \$650 for the year.

The director determined that the beneficiary was a first-line supervisor who was in charge of four non-professional employees of a small international trade and wholesale business. The director determined that the evidence provided did not support a conclusion that the beneficiary's duties had been or would be primarily executive or managerial in nature.

On appeal, counsel for the petitioner contends that the Service decision is fundamentally flawed because the Service draws a conclusion regarding executive capacity without considering whether the beneficiary would be acting in an executive capacity. Counsel asserts that the beneficiary is an executive and states that the primary purpose of the parent company sending the beneficiary to the United States "is for [the beneficiary] to exercise authority in managing and directing the U.S. subsidiary along with the president." Counsel also asserts that the beneficiary is a manager because the beneficiary will be supervising supervisory employees.

Upon review, the record is not persuasive in demonstrating that the beneficiary is acting in either a managerial or an executive capacity. 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 initial petition, the petitioner submitted a general description that was more indicative of an individual that would be providing services to the enterprise or at most acting as a first-line supervisor. The petitioner referred, in part, to duties such as "formulating and establishing product assurance program [sic] to prevent or eliminate defects," and "confer[ing] with engineers in China and Hong Kong about quality assurance," and "guide[ing] and instruct[ing] technical staff." The petitioner also indicated in the initial petition that the beneficiary would assist the president in the overall operation of the company, would be mainly in charge of the quality control department of the company and would coordinate functions and operations between departments, and assist the managerial group in attaining business objectives. This information is vague and does not convey an understanding of what the beneficiary will be doing for the petitioner on a daily basis. It is not possible to determine from this description whether the beneficiary will be performing managerial or executive duties with respect to these activities or whether the beneficiary will be actually performing the activities. The director properly requested additional information to clarify the nature of the beneficiary's proposed duties in her request for additional

evidence.

In response to the director's request for additional evidence, the petitioner, through its counsel, provided its reasoning why the beneficiary's proposed position of vice-president and manager of quality control met the criteria for a *managerial* position. The petitioner stated that the beneficiary would be "managing the quality control department," and "supervising, through his position as vice president, the work of other supervisory and managerial employees" and "recommend[ing] personnel actions." Contrary to counsel's assertion that the director impermissibly drew a conclusion regarding executive capacity, the director did not have a comprehensive description of the executive nature of the proposed position and relied instead on the petitioner's reasoning as it related to the managerial nature of the position. A petitioner can not claim a position is a hybrid "executive/manager" position and rely on partial sections of the two statutory definitions. Instead if the petitioner claims that the proposed position is both managerial and executive in nature, the petitioner must provide evidence in support of each of the elements of both definitions. Here, the petitioner has not provided a comprehensive description of the executive nature of the duties of the beneficiary's proposed position. The record does not support counsel's assertion that the beneficiary will be employed in an 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). Further, 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). The Service is not compelled to deem the beneficiary to be an executive simply because the beneficiary possesses an executive title.

Counsel's assertion that the beneficiary is a manager is also not persuasive. The record does not demonstrate that the beneficiary will be managing the organization or will be managing a function of the organization. In the initial description of the beneficiary's proposed job duties, the petitioner stated that the beneficiary "will assist the President in overall operation of the company. In addition, he will be mainly in charge of the Quality Control Department of the company." The most that can be gleaned from these two general statements is that the beneficiary will primarily be responsible for the quality control department and the president will be primarily responsible for the management of the organization. The response to the director's request for evidence confirms that the beneficiary will be primarily responsible for the quality control department. The record shows that the petitioner employed four individuals on a full-time basis in 1999. None of the individuals employed were individuals performing the quality control function. As such, it appears the beneficiary will be primarily performing the function of quality control rather than primarily directing, or managing, this

function through the work of others. 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).

Upon review, the petitioner has not established the beneficiary will be managing the organization or a department, subdivision, function or component of the organization. The petitioner has not met the criteria of the first element of the managerial definition. In addition, the petitioner has not sufficiently demonstrated that the beneficiary will be supervising and controlling the work of other supervisory, professional or managerial employees. The record does not clearly reflect that the employees of the petitioner are managers or supervisors other than in title. The organizational chart submitted by the petitioner includes employees that are not reflected in the IRS Forms W-2. 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 petitioner has provided insufficient evidence to overcome the director's determination that the beneficiary is not acting in a managerial or executive capacity as defined by the Act.

Beyond the decision of the director, the petitioner has provided inconsistent evidence regarding its relationship with the overseas Hong Kong entity. The petitioner's 1997 IRS Form 1120 reflects that the beneficiary owns 80 percent of the petitioner. The petitioner's 1998 IRS Form 1120 reflects that the beneficiary owns 60 percent of the petitioner. The petitioner's 1999 IRS Form 1120 reflects that a foreign entity owns 100 percent of the petitioner. The petitioner has offered no explanation of the inconsistencies regarding the ownership and control of the petitioner. Neither has the petitioner offered amended tax returns to reflect the true ownership if the 1997 and 1998 tax returns were in error. As noted above inconsistencies in the record must be explained or reconciled with competent objective evidence. Matter of Ho, supra.

As the appeal is dismissed for the reason stated above, this issue is not examined further.

In visa petition proceedings, 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.