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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

[Redacted]

JUL 25 2002

File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date:

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:

[Redacted]

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

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DISCUSSION: The employment-based visa petition was denied by the Director, Nebraska 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 the manufacture and retail of futon furniture. 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 demonstrated that the majority of the beneficiary's duties were executive in nature or that the beneficiary supervised professional or supervisory personnel.

On appeal, counsel for the petitioner asserts that the director abused his discretion in denying this petition.

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.

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 beneficiary has been and 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 Michigan in March of 1993. Forty-nine of the petitioner's shares were issued to the beneficiary and fifty-one of the petitioner's shares were issued to the beneficiary's husband. The beneficiary and her husband also own a Canadian enterprise in equal shares. The petitioner provided a description of the beneficiary's proposed job duties in its offer of employment stating that:

[the beneficiary] was transferred to the United States to fill the position of Director of Merchandise and Sales for our U.S. operations. She is responsible for formulating merchandising and sales policies. She coordinates the merchandising and sales activities of futon furniture. She also determines the mark-up and mark-down percentages necessary to ensure a profit. [The beneficiary] is responsible for customer relations. She also supervises the other employees at the U. S. operations.

The petitioner also included a copy of the first page 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 \$451,996, compensation of officers in the amount of \$40,000 and salaries paid in the amount of \$3,503.

The director requested additional evidence to establish that the beneficiary qualified under all four criteria set out in the definition for either a manager or executive found at Section 101(a)(44)(A) and (B) of the Act. The director also requested the petitioner provide an organizational chart showing the beneficiary's position in the United States company.

In response, the petitioner stated that:

[the beneficiary], with the help of part-time sales labor, operated the store completely. She orders merchandise, both from the Canadian store and from outside sources and is the principle sales person performing all functions necessary for the retail operation.

The petitioner then concluded that the evidence submitted, demonstrated that the beneficiary directs the management of the organization, establishes the goals and policies of the organization, exercises wide latitude in discretionary decision making and receives only general supervision from anybody else. The petitioner also provided an organizational chart depicting a president, the beneficiary as vice president in charge of store operations including purchases, bookkeeping and sales and three part-time sales staff.

The director determined that the beneficiary was primarily performing duties that were not managerial or executive in

nature.

On appeal, counsel for the petitioner asserts that the director abused his discretion by not considering that in a "small, yet highly successful retail furniture business, the executive plays many roles . . ." Counsel then re-states the four criteria found for the definition of executive and offers conclusions on how the beneficiary's duties meet this definition.

Upon review, counsel's assertion is 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). In the initial petition, the petitioner submitted a broad position description that vaguely refers, in part, to duties such as "formulating merchandising and sales policies," and "coordinate[ing] the merchandising and sales activities of futon furniture." The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

In the response to the request for evidence, the petitioner clarified the beneficiary's tasks for the petitioner. The petitioner stated that the beneficiary operated the store completely, noting that she only had the help of a small part-time sales staff. Contrary to counsel's claim that the beneficiary directs the management of the organization, the evidence of record indicates that the beneficiary is performing all the necessary services for the petitioner. She orders merchandise, does the bookkeeping, negotiates purchase prices, and sets prices. All of these tasks are indicative of an individual primarily performing the necessary tasks that are part of owning and operating a retail store. Case law establishes that 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). It is apparent that the beneficiary does not oversee or supervise the basic operations but rather performs the non-managerial tasks of the petitioning company.

Further, the record substantiates that the petitioner does not have a staff sufficient to relieve the beneficiary from performing non-qualifying duties. The petitioner states that it only employs three part-time employees. The IRS Form 1120 for 1998 substantiates this by revealing that only \$3,503 was paid in salaries to individuals other than the beneficiary. At the time of filing, the petitioner was a six-year old retail company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioner require an 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. The petitioner confirms 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.