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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]

30 JUL 2002

File: WAC 98 231 50304 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the state of California and is engaged in providing recreational facilities in the form of a swim and tennis club. 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 description of the duties for the beneficiary was inadequate for this visa classification.

On appeal, counsel for the petitioner asserts that the Service's decision was arbitrary and capricious. Counsel further asserts that the Service impermissibly took into account the size and type of petitioner's company when making its decision.

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 petitioner has provided sufficient evidence to demonstrate that the beneficiary has been and will be performing managerial or executive duties for the United States enterprise.

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).

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner initially described the proffered position as:

> This position requires the beneficiary . . . to primarily direct the overall organization. She supervises and controls the work of all employees and has the authority to hire and fire individuals, recommend promotions and pay increases and generally exercise over day to day [sic] operations. As president, she also directs activities of the company.

> She reviews project proposals to plan time frames and funding limitations, as well as developing staffing plans, work plans, and schedules for each project phase.
>
> The position of president of this particular company requires the beneficiary to be responsible for overseeing and directing corporate and financial planning, for negotiating contracts with various vendors and suppliers for the project designs.
>
> The position also calls for skills and abilities to manage and direct the company's investments, including strategic planning, fiscal and budgetary controls, financial statistics, and ratio analysis.

The petitioner also submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1997. The IRS Form 1120 showed assets of $28,457, gross receipts of $124,004, taxable income of ($5,697) and that $19,703 in salaries had been paid and that no compensation was provided to officers of the company. The petitioner also submitted IRS W-2, Wage and Tax Statement Forms for several employees for the year 1997. The petitioner did not submit a W-2 for the beneficiary.

The director requested the petitioner provide additional information primarily in regard to the ownership of the petitioner and the claimed foreign parent company. The director also requested the petitioner's IRS Form 1120 for the year 1998 and an organizational chart including the positions and duties of all the employees.

In response, the petitioner submitted an undated organizational chart listing the beneficiary as president. The petitioner described the beneficiary's duties as follows:

> [The beneficiary] is responsible for overseeing the daily operation of the business. She has developed corporate policies and procedures, hired and trained all employees, negotiates all contracts for corporate expenditures. [The beneficiary] develops the marketing strategies to make [the petitioner] known to residents and businesses for membership. She reports to the Board of Directors.

The petitioner also submitted a position description for a manager as follows:

> As Manager of [the petitioner] [the manager] is responsible for interaction with all club members, she insures [sic] that the pool deck and tennis courts are maintained and safe for member use. She oversees all employees, develops work schedules and contacts various

contractors for maintenance and repair of club facilities.

The petitioner also explained that most of its employees were young men and women (students) who worked in part-time positions, manning the front desk of the club to check membership cards, cleaning the pool deck and tennis courts, emptying trash and generally ensuring that all members and guests obeyed the club rules. The petitioner listed eight individuals in these part-time positions.

The petitioner also submitted its IRS Form 1120 for the year of 1998. The Form 1120 reflected that the petitioner had $173,538 in total assets, $156,688 in gross receipts, $15,372 in taxable income and that $37,252 in salaries had been paid. The petitioner also provided California Employment Development Department (EDD) Forms for quarters ending in March and June of 1998. The EDD Forms reflected that salaries had been paid to various individuals, excluding the beneficiary, in these quarters.

The director found that the record did not establish that the duties described for the beneficiary were adequate to support a visa classification as executive or manager. The director further noted that the size of the petitioner's business and the type of business it conducted normally would not require the hiring of a full-time president.

On appeal, counsel for the petitioner asserts that the beneficiary's duties are many and varied, that she oversees the manager and 13 employees. Counsel asserts that the beneficiary's duties are executive in nature. Counsel takes issue with the director's determination that the kind or size of the business is relevant when making a determination regarding the executive or managerial nature of the beneficiary's duties. Counsel also notes that a brief and/or evidence would be forthcoming in 30 days. To date, over two years later, careful review of the record reveals no subsequent submission; all other documentation predates the issuance of the notice of decision.

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). In the initial petition, the petitioner submitted a broad position description that vaguely refers, in part, to duties such as "reviews project proposals to plan time frames and funding limitations," and "overseeing and directing corporate and financial planning," and "manage[ing] and direct[ing] the company's investments, including strategic planning, fiscal and budgetary controls, financial statistics, and ratio analysis." This description of job duties is vague and general in nature. Furthermore, the position description states that the beneficiary is responsible for "direct[ing] the overall organization," and

"direct[ing[activities of the company," and "supervise[ing] and control[ling] the work of all employees." These statements essentially paraphrase elements contained in the statutory definition of managerial and executive capacity. 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.

The record contains insufficient evidence to demonstrate that the beneficiary's duties will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will manage the organization through the work of others. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her 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 a managerial or executive title.

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 year old "recreational facility that claimed to have a gross receipts of $173,538. The firm employed the beneficiary as president and a manager as well as several part-time employees. While the employees performed some tasks to continue the operations of the petitioner, the petitioner has not made the day-to-day tasks of the beneficiary clear. It is not possible to conclude based on the vague representations of petitioner, that the reasonable needs of the petitioner are met by the beneficiary serving in a primarily executive or managerial capacity. Further, as discussed above, the petitioner has not established the essential element of eligibility that the beneficiary will be employed in the United States in a primarily executive or managerial capacity.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered salary of $25,000 per year. The petitioner has not provided evidence that it has paid the beneficiary in the past. The IRS Form 1120 for the year 1998, the pertinent year to consider when looking at the issue of ability to pay the proffered wage does not reflect that the beneficiary was compensated as an officer. The California EDD Forms likewise do not reflect that the beneficiary

was compensated. The petitioner also has not provided sufficient evidence that its net income in the year of filing (1998) was equal to or greater than the proffered wage. The petitioner's IRS Form 1120 for 1998 reflects taxable income of $15,372. The petitioner also has not provided sufficient evidence that the petitioner's net *current* assets in the year of filing were equal to or greater than the proffered wage.

As the appeal will be 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.