



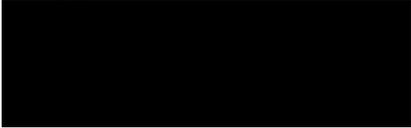
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U.S. Department of Justice

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: EAC 00 203 55094

Office: VERMONT SERVICE CENTER

Date: 30 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 employment-based visa petition was denied by the Director, Vermont 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 distribution of handbags, luggage, and optical accessories. It seeks classification of the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as the petitioner's manager of the finance department. The petition was filed June 15, 2000. The director determined that the petitioner had not demonstrated that the beneficiary was employed in a managerial capacity.

On appeal, counsel for the petitioner asserts that the director failed to consider certain facts leading to an erroneous 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.

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 New York in July of 1997 and is a wholly-owned subsidiary of a South African company. The petitioner initially described the beneficiary's job responsibilities as manager of the finance department as follows:

- (1) responsible [sic] for the overall management of financial operations of our company;
- (2) complete autonomy in management of the Finance Department, periodic reporting to the President;
- (3) managing and coordinating the financial operations for the three primary Departments of Sales, Finance and Operations involving funding, capitalization, overseeing tax compliance;
- (4) consulting with outside U.S. attorney retained by Petitioner on matters of finance and tax regulations;
- (5) recommends and coordinates with the President and Manager of Operations in decisions related to budget allocations;
- (6) carrying full responsibility for accounts payable and receivable;
- (7) formulate [sic] a pricing strategy in sales based on requisition and sales contracts, consumption rates, current market conditions and characteristics of items;
- (8) supervising [sic] two professionals (with Bachelors) --- Administrative Assistant and Sales Manager. In particular the Administrative Assistant will be handling all administrative tasks generated from [the beneficiary's] professional services and those related to the Finance Department.

The petitioner also included a copy of its organizational chart depicting a president (also the marketing manager), a finance manager and chief accountant (the beneficiary's position), a vice president of operations, and a sales manager. The chart also included a "professional administrative assistant" as the only individual reporting to both the beneficiary and the vice president of operations. Contrary to the description of the beneficiary's responsibilities, the chart noted that the outside local law firm and the outside CPA service personnel reported to the president.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1998. The 1998 IRS Form 1120 reflected gross receipts of \$1,058,463, compensation of officers in the amount of \$41,667, and salaries paid in the amount of \$38,680.

The director requested a comprehensive description of the beneficiary's duties including a breakdown of the number of hours

devoted to each of the beneficiary's duties.

In response, the petitioner stated that:

[The petitioner], has on its staff seven (7) members with the 8th (professional Administrative assistant) slated to start 1/1/2001 and a professional independent contractor currently under recruitment. . . . At the helm is the President whose executive responsibilities require that she often take short trips to the South African parent company In the President's absence the beneficiary (notwithstanding her title of Manager of the Finance Department) acts as stand-in for the President on behalf of the U.S. entity. All the Managers of the Department [sic] of Finance, Operations and Sales report to the President. Directly below the Finance Manager is the Finance Assistant performing all professional ground work [sic] arising within the purview of the professional duties of the Beneficiary. The Finance Assistant recently joined the Petitioner in 9/1/00 and she reports directly and exclusively to [the beneficiary]. Below the Finance Assistant is the professional Administrative Assistant who answers to both the Finance Assistant and Manager of Operations. The Administrative Assistant is charged with administrative tasks generated by the Departments of Finance and Operations. The new Administration Assistant (degreed) answerable [sic] to the managers of Operations and Sales is slated to begin 1/1/01.

The petitioner also provided a revised organizational chart reflecting the above description of its structure. The petitioner also outlined the beneficiary's weekly tasks as conferencing with the president and acting as stand in for the president for five hours, collaborating with the president in formulating pricing strategies for five hours, meeting and supervising contacts with the finance assistant for seven hours, assessing financial statements for three hours, directing feasibility studies regarding capitalization for two hours, feasibility analysis for six hours, budgeting for three hours, examination and evaluation of reports relating to the company's financial health for three hours, coordinating financial matters with parent company for three hours, assessing and recommending credit terms for approval by the president for two hours, and supervising the financial assistant for two hours.

The director determined that the petitioner had failed to establish that the beneficiary would be engaged in primarily managerial job duties.

On appeal, the petitioner states that additional facts that were previously unavailable are being provided. The petitioner then indicates that a new assistant was hired as of January 1, 2001 and

that a marketing concern had also been hired as an independent contractor effective May 2000. The petitioner also notes that it uses a delivery staff including United Parcel Service personnel that is under the supervision of the administrative assistant. The petitioner also asserts that the director failed to consider the clarification of its organizational structure and its business and expansion. The petitioner further asserts that the beneficiary is acting as a function manager of finance and that she directs the implementation of the functions through her subordinate staff. The petitioner finally asserts that the beneficiary has assumed the role of acting president since July of 2000 and then re-states portions of the previous job descriptions provided for the beneficiary's position.

The petitioner also provided Form NYS-45-ATT, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the first quarter of 2001. The form NYS-45-ATT reflected eight employees.

Upon review, the petitioner's information and 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 "overall management of financial operations," and "complete autonomy in management of the Finance Department," and "managing and coordinating the financial operations," and "recommend[ing] and coordinate[ing] with the President and Manager of Operations in decisions related to budget allocations." The Service is unable to determine from these statements whether the beneficiary is performing managerial duties with respect to these activities or whether the beneficiary is actually performing the activities.

In addition, a portion of the initial job description is more indicative of an individual performing tasks such as formulating pricing strategies. 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).

In response to the director's request for evidence, the petitioner's lengthy but general description does not expand on or clarify the beneficiary's job duties. The petitioner did not submit any evidence to establish that the beneficiary actually conducted the broadly cast description of duties, such as, conferring with the president and collaborating with the president in formulating pricing strategies and directing and analyzing feasibility studies. Furthermore, the petitioner's description again includes activities more indicative of an individual performing services rather than directing or managing them. For example, the petitioner indicates that the beneficiary does the

feasibility analysis, assesses the financial statements, assesses credit terms, and does the budgets.

Further, the petitioner has provided insufficient evidence to establish that it employed subordinate staff members that would perform the actual day-to-day, non-managerial operations of the company. At the time of filing the petition, the petitioner's organizational chart reflected four managerial employees and one administrative assistant. It does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as financial manager, three additional managerial employees and one administrative assistant.

Finally, the petitioner's assertion that the beneficiary is acting as a function manager of finance and that she directs the implementation of the functions through her subordinate staff is not supported by the record. The information regarding the petitioner's subordinate staff is found in the organizational chart submitted with the petition and the subsequent two conflicting organizational charts submitted in response to the director's request for evidence and on appeal. The petitioner has not provided independent evidence to support the information contained in any of the three charts. 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).

Furthermore, the petitioner's organizational structure has been revised and revised again without adequate explanation. The first organizational chart indicates that the beneficiary shares the supervision of an administrative assistant. There is no indication on the organizational chart that the beneficiary supervises the sales manager as stated in the original job description. The second organizational chart in response to the director's request for evidence shows the beneficiary supervising a financial assistant that purportedly joined the company in September of 2000 and who began sharing the responsibility of supervising an administrative assistant. This added layer of purported supervisory responsibility is not adequately explained or supported by independent sources. Moreover, if the petitioner is actually adding employees after the filing of the petition, such additions do not contribute to a finding of eligibility. A petitioner must establish eligibility at the time filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971). The third organizational chart, submitted on appeal, labels the only individual reporting to the beneficiary as a finance supervisor who purportedly supervises a finance assistant. The indiscriminate and inconsistent use of position titles only adds to the confusion surrounding the beneficiary's actual job responsibilities as the responsibilities relate to purported subordinate employees. 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. 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 not established that the beneficiary manages a function through the use of subordinate employees.

The petitioner's assertion that the beneficiary has assumed the role of acting president since July of 2000 again is not supported in the record. The petitioner has not provided sufficient information that the beneficiary assumes this role.

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 record does not sufficiently establish that the beneficiary will be directing the management of the organization or a function of the organization. The petitioner has not established that the beneficiary will be managing a function of the organization through the use of subordinate employees. The Service is not compelled to deem the beneficiary to be a manager or an executive simply because the beneficiary possesses a managerial 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.