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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



JUL 30 2000

File: [Redacted]

Office: TEXAS SERVICE CENTER

Date: JUL 30 2000

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 visa petition was denied by the Director, Texas 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 Texas engaged in the publication business. 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 beneficiary would be employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the evidence submitted demonstrates that the beneficiary performs as an executive for the petitioner.

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 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).

The petitioner initially described the beneficiary's proposed duties in its statement of employment. The brief description indicated the beneficiary decided and implemented the goals and policies of the company. The petitioner also noted that the beneficiary would directly supervise and control the work of the entire operation including monitoring publications. The petitioner further indicated that the beneficiary would function at the top level of the organization and exercise discretionary authority over the day-to-day operations including hiring and firing. The petitioner indicated that the beneficiary would be compensated for these duties in the amount of \$37,200 per year. The petitioner elaborated on the beneficiary's duties in another letter as follows:

1. Attend meetings of the Board of Directors, Executive Committee to plan, implement, develop and establish objectives and policies;
2. Set up strategies and approaches in accordance with the charter of [the petitioner], the charter of the Parent Company, the decisions of the Board of

Directors, Executive Committee, the business needs, funding and resources;

3. Make arrangements and procedures, and choose options and methods about publication, copyrights acquiring [sic] and transferring, translation, design, printing, quality control, promotions through books fair, [sic] broadcasting, fliers, newspapers and magazines, or other activities;
4. Work as Chief Editorial [sic] to do editing and train editors, choose books, and make decisions on translation matters and other editing and publishing matters;
5. Be a Channel [sic] for the communication between Parent Company and [the petitioner];
6. Help [petitioner] establish good and lasting relationship with customers, deal with customers' complaints, understand and accommodate customers' needs and interests, explore potential customers, provide necessary customer services, etc.;
7. Do markets [sic] surveys and explore the potential markets in other areas, such as Canada, South American countries, etc.;
8. Establish internet for sales and distributions of the products (3% of his time);
9. Supervise and direct staff to reach Parent Company's and [petitioner's] goals;
10. Review business decisions, strategies, policies and other activities, and make suggestions and improvements therefore [sic];
11. Exercise discretionary authority over hiring, firing, promotion and benefits of employees;
12. Represent the [petitioner] to negotiate and make business transactions and arrangements with outside business, distributors and suppliers; and
13. Exercise discretionary authority over other day-to-day operations.

The petitioner further included the beneficiary's job and work description for the petitioner for the past year and for which he was compensated \$60,000 as follows:

1. In charge of the marketing and management in U.S. [redacted], Establish Strategies [sic], make plans for future product, including selection and production, to ensure the growth of the U.S. branch.
2. Begin training people in the area of editing, writing, publishing and printing.
3. Responsible of [sic] contacting American Publishers, build [sic] up good working relationships and also apply for translation rights for good books, in order to translate them into Chinese
4. Work with USWB to establish web site and make the U.S. branch of [redacted] the global internet

sales center.

5. Plan the working schedule and details of building an audio/visual studio, interviewing potential co-workers in the related fields, such as musical, broadcasting, program production and recording, in order to establish the studio for [REDACTED] in U.S.A.

6. In charge of financial planning and managing the company's resources and accounting.

7. Serve as speakers [sic] for various evangelical, or spiritual revival meetings for local churches and Christian organizations.

8. Oversee the Chinese-to-English translation for Chinese books, also in charge of the whole planning, editing, publishing and sales process.

9. Responsible of singing [sic] contracts with American publishers, and to build up a global sales network.

10. Conduct inventory and pay royalty dues to various publishers in U.S.A.

The director requested the petitioner provide documentary evidence of the petitioner's employees and the duties that indicate that the beneficiary is a manager or executive in the United States. The director specifically requested that the petitioner include its 1999 federal income tax return and the last 12 months of payroll taxes filed and paid.

In response, counsel for the petitioner re-submitted the above job descriptions for the petitioner. The petitioner also included the petitioner's 1999 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The Form 1120 showed assets of \$238,762, gross receipts of \$29,110, taxable income of (\$82,523) and salaries paid in the amount of \$48,205. The petitioner further included IRS Forms W-2, Wage and Tax Statements for the year 1999. The 1999 W-2 Forms showed the beneficiary was paid \$16,499, the vice-president of the company was paid \$15,534, and three other employees an approximate total of \$16,171. The petitioner also included its IRS Forms 941, Employer's Quarterly Federal Tax Return for the first two quarters of 2000. The IRS 941 Form for the first quarter listed four employees, the vice-president, two other full-time individuals and an individual that worked approximately a month of the quarter. The IRS 941 Form for the second quarter listed three employees, the vice-president, one other full-time individual and an individual working approximately one month of the quarter.

The director found that the petitioner had not submitted sufficient evidence to establish that the beneficiary qualified for the multinational executive or manager classification. The director noted that based on the record, the beneficiary was doing most of the work of the company.

On appeal, counsel for the petitioner asserts that the evidence provided is sufficient to establish that the beneficiary performs as an executive for the petitioner and that company size is irrelevant. Counsel also asserts that the beneficiary was the executive and chief editor of both the parent company and the petitioner. Counsel further asserts that the petitioner employs three individuals who have their own responsibilities that are monitored by the beneficiary. Counsel finally asserts that the beneficiary is also responsible for editing the translated Christian books and for writing articles.

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 refers, in part, to duties such as attending board meetings "to plan, implement, develop and establish objectives and policies" and to "set up strategies and approaches" of the petitioner and the foreign entity. The petitioner also paraphrases certain elements contained in the statutory definition of manager and executive by stating that the beneficiary "supervise[s] and direct[s] staff," and "exercises discretionary authority over hiring, firing, promotion and benefits," and "exercises discretionary authority over other day-to-day operations." No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position.

Many of the other duties of the beneficiary that are described by the petitioner only support the director's conclusion that the beneficiary is primarily performing the work of the petitioner. The petitioner indicates that the beneficiary arranges the options and methods of publication, writes articles, works as the chief editor, does market surveys, trains editors, contacts publishers, plans the schedule of the studio, pays royalties, and is a public speaker. 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). The petitioner has not provided evidence that indicates individuals other than the beneficiary perform these duties.

It is noted that the petitioner does not adequately 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. Counsel, on appeal, seems to assert that the beneficiary is claiming to be engaged in executive duties. However, we note that the petitioner has borrowed freely from the definition of managerial duties when describing the beneficiary's duties. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of

the two statutory definitions.

In any event, 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. The record supports the conclusion that the beneficiary is primarily performing the operations of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. Counsel's assertion that the beneficiary monitors three employees who have their own specific responsibilities is not sufficient in this regard. 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). Finally, 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 petitioner 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 this petition, the petitioner was a two-year-old publishing company that claimed to have a gross income of \$29,110. The firm employed the beneficiary as president, a vice-president and one to two full-time employees and one part-time employee. As noted above, the petitioner did not submit sufficient evidence that it employed subordinate staff members that would perform the actual day-to-day operations of the company. 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. Again, based on the petitioner's representations, the beneficiary is primarily performing the services of the corporation. The petitioner has not established the beneficiary is employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered salary. The petitioner's payment to the beneficiary in 1999 was only \$16,499. The petitioner's IRS 941 Forms for the first two quarters of 2000 did not reflect any salary paid to the beneficiary. The petitioner reported its income at a net loss for 1999. Further, the petitioner's current liabilities are equal to

or greater than the petitioner's current assets as noted on its IRS Form 1120. The record does not support a finding that the petitioner has the ability to pay the proffered wage to the beneficiary. 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.