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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 98 211 50380 Office: CALIFORNIA SERVICE CENTER

Date: JUN 13 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.

It is noted for the record that the petitioner has a second petition that is pending review before this office. The petitioner has filed an appeal of a nonimmigrant petition (EAC 00 122 51138) which was denied by the director of the Vermont Service Center on October 24, 2000. The nonimmigrant record will be referenced in this proceeding, for the purpose of presenting uniform decisions in both matters.

The petitioner purports to be a branch office of [REDACTED] a Private Limited Company [REDACTED] doing business in Calcutta, India. The petitioner and [REDACTED] are both owned by the beneficiary's brother, [REDACTED]. The petitioner began doing business in the United States in March of 1996 upon the approval of the beneficiary's L-1A visa classification. The petitioner is engaged in the business of import and export of manufactured steel fence products and computer software. It seeks to employ the beneficiary as its vice-president. 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 would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the information provided is sufficient to justify the beneficiary's position as an executive and manager.

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.

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 submitted [an uncertified] Form ETA 750, Application for Alien Employment Certification, parts A and B. The petitioner described the beneficiary job duties in the Form ETA 750 as follows:

The vice-president of the U.S. branch is required to perform the following executive and managerial duties: Management and executive staff; sales: sets targets and performance levels, increase volume and profit margins; budgets: to set targets and oversee achievement of same; Corporate expansion: Identify territories and markets to promote growth of business. Has ultimate responsibility for day to day operation of business including hiring and firing employees as required, salary recommendations, promotion, reviews, etc. Confers with parent company officers and coordinates efforts to promote sales and marketing of company products.

The petitioner also submitted Internal Revenue Service (IRS) W-2 Forms for the year 1997 for two employees, the beneficiary and Gordon Hunt, the marketing executive. The salary paid to the beneficiary was \$21,600 and the marketing executive was paid \$1,190. Thus the total salaries paid by the petitioner for the year 1997 was \$22,790. In that same year the petitioner's IRS Form 1040NR, U.S. Nonresident Alien Income Tax Return Schedule C showed gross receipts in the amount of \$1,039,224. The petitioner also submitted IRS Form 1040NR, U.S. Nonresident Alien Income Tax Return Schedule C for the year 1996 showing gross receipts in the amount of \$938,399. The total wages paid that year was \$11,840. The IRS Forms 1040NR Schedule C also contain a reference to the

petitioner paying \$3,103 in commissions in 1996 and \$1,254 in commissions in 1997.

The director requested additional evidence including the petitioner's organizational chart showing the current names of the executive(s), manager(s), supervisor(s) and the beneficiary's position on the chart. The director also requested names of other existing employees, specifically employees under the beneficiary's supervision in the United States including job titles, brief job duties and nonimmigrant status of those employees.

In response, the petitioner submitted an organizational chart and a brief description of the petitioner's employees and claimed sales agents. The petitioner indicated it employed an individual as the managing director and sales manager and also employed a salesperson. The petitioner also indicated three independent sales agents worked to promote the petitioner's products and reported to the beneficiary. The petitioner further indicated that two outside contractors handled its brokerage and freight forwarding needs and that a CPA was in charge of financial planning, tax returns, payroll and accounting and that these individuals all reported to the beneficiary.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity but that the beneficiary was involved and participating in the day-to-day non-executive aspects of the business.

On appeal, counsel asserts that the beneficiary is an executive and supervises and directs the functions of the contract workers for the company. Counsel also asserts that the Service is not qualified to determine how many employees need to be employed at which juncture of time as a measure of the growth of the company. Counsel further asserts that the Service does not have the authority to deny an application based on its own perceptions of how a business ought to run and how many people need to be supervised by a manager in order to decide if his capacity is managerial. Counsel finally asserts that the Service's requirements are beyond the petitioner's burden.

Counsel's assertions are not persuasive. The petitioner has not provided supporting documentary evidence that it employs anyone other than the beneficiary and one other individual. The individual hired in addition to the beneficiary was only hired in August of 1997. 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). The organizational chart provided by the petitioner and the assertions of counsel are insufficient to establish that the petitioner employs anyone other than the beneficiary and one other individual. 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 petitioner has not provided evidence that it employs sufficient staff to relieve the beneficiary from providing non-qualifying services. 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 record reveals a company engaged in the import and export of certain products and based on its gross receipts and its number of employees, the beneficiary necessarily must engage in the day-to-day performance of importing and exporting those products. The record is deficient in supporting documentation demonstrating that contract employees have been hired and are performing work on a regular basis that is sufficient to relieve the beneficiary from performing non-qualifying tasks. On review, the record does not demonstrate that the beneficiary is managing or directing the management of the organization through the work of others.

Counsel's assertion that the Service is not qualified to determine how many employees an organization must have at each stage of the growth of a company is mistaken. The Service necessarily must determine whether a petitioner has provided sufficient evidence to establish that a beneficiary has been or will be functioning as a manager or executive as defined by the Act. The evidence submitted must demonstrate that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature. In the case at hand, as noted above, there is a complete lack of evidence to support the petitioner's claim that the beneficiary has sufficient staff to relieve the beneficiary from performing operational duties rather than managerial or executive duties.

Counsel's further assertion that the Service does not have the authority to deny an application based on its own perceptions of how a business ought to run and how many people need to be supervised by a manager in order to decide if his capacity is managerial is also fallacious. The Attorney General has delegated authority to the Associate Commissioner at 8 C.F.R. 103.1(f)(3) to determine employment-based petitions. As noted above, the Service bases its decision on the record before it and when the record is deficient in supporting the claims and assertions of the petitioner, the Service is required to deny the petition.

On review of the complete record, the petitioner has not provided sufficient information to demonstrate that the beneficiary will be directing the management of the organization or a major component or function of the organization. There is also insufficient information in the record to conclude that the beneficiary will be managing the organization or a department, subdivision, function, or component of the organization. The petitioner has not provided information describing the day-to-day activities of the beneficiary and the record itself supports a finding that the

beneficiary is performing the tasks necessary for the operation of the petitioner.

On review of the record, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner in this case is a nonresident alien as indicated by his IRS Income Tax Returns of 1996 and 1997. As noted above, this visa classification is limited 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. The petitioner in this case is not a United States entity but instead a nonresident alien. Furthermore, as a matter of law, there is no prospective United States employer which could be considered the "same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. 204.5(j)(3)(i)(C). The petitioner in this case is wholly-owned by one individual and is a sole proprietorship. There is no evidence, nor is there any claim, that the petitioner in this matter is a corporation, partnership, or other legal entity which would have a legal identity separate and apart from the owner, since, in a sole proprietorship, "[t]he business and the proprietor are one." In re Drimmel, 108 Bankr. 284, 286-87 (Bankr. D. Kan. 1989). For immigration purposes, a sole proprietorship is not a legal entity separate and apart from its owner. Matter of United Investment Group, 19 I&N Dec. 248 (Comm. 1984). For this additional reason, the petition may not be approved.

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.