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U.S. Department of Justice

Immigration and Naturalization Service

"Identifying data deleted to prevent only unwarranted invasion of personal privacy"

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

[Redacted]

17 JUN 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 preference visa petition was denied by the Director, Nebraska Service Center. The matter was appealed to the Associate Commissioner for Examinations and the appeal was dismissed. The dismissal decision noted the absence of a brief in the matter. Upon receipt of the decision, the petitioner proffered evidence that a brief had been timely filed. Because the brief in support of the appeal was not considered, the Service will reopen the proceeding on its own motion for a new decision on the appeal. The appeal will be dismissed.

The petitioner is a corporation that was incorporated in North Dakota in April of 1993. The petitioner employs one staff member, the beneficiary. The petitioner is engaged in purchasing, developing and selling building lots in [REDACTED]. It seeks to employ the beneficiary as its president and manager. 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 had been or would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the beneficiary's duties are primarily managerial and executive in nature and that the petitioner has generated a significant number of American jobs. Counsel for the petitioner also requests oral argument. Oral argument is limited to cases where cause is shown. 8 C.F.R. 103.3(b). It must be shown that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, the issues are sufficiently represented by the written record. No cause for oral argument is shown. Therefore, the request is denied.

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 initially described the beneficiary's duties as follows:

As President of [the petitioner] and Chairman of [the petitioner's] Management Committee, [the beneficiary's] responsibilities focus on managing the property, preparing and implementing strategies for selling its lots, managing its finances and formulating its business strategy. [The beneficiary] remains responsible only to the Management Committee of [the petitioner], and through it, to the directors and Shareholders of [the petitioner]. We rely on him for all aspects of the management of [the petitioner]. [The beneficiary] effectively does the work of the Chief Executive Officer, Chief Financial Officer and Chief Operating Officer.

The petitioner also included the management agreement entered into between the petitioner and the beneficiary and stated that the terms of the beneficiary's employment would continue to be governed by the management agreement. The management agreement provides for a management committee made up of three individuals, the beneficiary and the majority shareholder of each of the two corporations that have invested in the petitioner. The management agreement states that a quorum of the management committee consists of the two majority shareholders of the corporations that have invested in the petitioner. The beneficiary is not necessary to establish a quorum of the management committee. The management agreement provides that "the Management Committee shall approve all stages of the planning, subdivision, financing [sic] development and marketing of the Planned Area and make all Major

Decisions . . .” The management agreement defines the term “major decision” listing twenty different items that constitute a major decision. A major decision includes the decision to “appoint or engage any consultant, land surveyor, engineer, architect, auditor, real estate broker or agent or expert in respect of the Municipal Services or the Planned Area.” A major decision also includes decisions to enter into agreements with the City or planning authority or to award, sign or otherwise enter into any agreement for the construction or installation of Municipal Services. A major decision also includes a decision to expend funds in excess of \$5,000 unless the item is included in the budget approved by the management committee. A major decision further includes a decision to enter into any agreement for the listing for sale, or for the sale of the planned area or any part thereof. The management agreement lists fifteen additional items defined as major decisions and thus requiring the approval of the management committee. The management agreement further states that “[n]either the Corporation nor the Manager shall, without the approval of the quorum of the Management Committee, do any matter which is a Major Decision.” The management agreement defines the “planned area” as land in Cass County, North Dakota consisting of approximately 293 acres. The management agreement does indicate that the management agreement may be amended with the consent of the parties but no amendments were provided.

The director requested that the petitioner describe the percentage of time devoted to each of the beneficiary’s positions and for a description of how the routine daily duties were assigned.

In response, the petitioner through its counsel indicated that the beneficiary devoted approximately 75 percent of his time to executive and managerial activities. Counsel also provided a description of the types of duties the beneficiary would perform as the financial officer, the operating officer and the executive officer. Counsel further stated that:

As [the petitioner’s] chief executive, once [the beneficiary] decides what needs to be done, he determines first whether he can do the work himself or whether an independent contractor - attorney, accountant, engineer, builder, contractor or other service provider - can more efficiently do the job. If it makes business sense for [the beneficiary] to do the work himself, he simply delegates himself the job and completes it. If contracting out the work is preferable, [the beneficiary] hires the appropriate service provider and oversees completion of the job . . . [M]any of the day-to-day tasks are incidental and [the beneficiary] is technically proficient and able to do them.

The director indicated that she expected that the administrative tasks for the petitioner would take considerable time. The

director then concluded that because the petitioner only employed the beneficiary, and no other staff, the beneficiary's tasks were not considered managerial or executive in nature.

On appeal, counsel asserts that the beneficiary is serving the petitioner in both an executive and a managerial capacity. Counsel asserts that when applying the law to the facts concerning the beneficiary's services as an executive, "the critical point to remember . . . is that there is no one else guiding the petitioner." Counsel asserts that when applying the law to the facts concerning the beneficiary's services as a manager, it is the beneficiary who manages the petitioner and all of its components and functions. Counsel notes the petitioner's primary business functions are as follows:

1. Identify profitable residential real estate development opportunities and develop plans for exploiting those opportunities;
2. convert the selected land to a planned residential community consisting of individual finished lots ready for the construction of single family residences; and
3. promote the planned residential community to draw customers to the community to purchase the individual lots produced in number 2.

Counsel states that the beneficiary performs the first function in his executive capacity and out sources the latter two functions, retaining control of their management. Counsel finally states that the beneficiary estimates that his non-executive duties occupy about fifteen hours per week or twenty-five percent of his working time.

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 management agreement between itself and the beneficiary. The management agreement clearly sets out the beneficiary's duties and the restrictions limiting the beneficiary's authority. Contrary to counsel's assertion that there is no one else guiding the petitioner, the management agreement clearly establishes that the management committee, of which the beneficiary is a part, guides the petitioner. Although the beneficiary may recommend actions to the management committee, the shareholders of the corporations owning the petitioner constitute a quorum of the management committee and can essentially act without the beneficiary's input. The reverse is not allowed under the management agreement. That the quorum of the management committee may choose not to act without the beneficiary's input is irrelevant, the authority to direct the management of the organization or a function of the organization rests with the management committee not with the beneficiary. The extensive list of major decisions requiring input from the

management committee is evidence that the beneficiary is restricted from exercising wide-latitude in discretionary decision-making.

Counsel's assertion that the beneficiary is performing an executive function when he identifies profitable residential real estate opportunities and develops these opportunities is also not persuasive. The beneficiary is primarily performing a basic operation of the company when he performs this task. As noted above, the management committee is the ultimate decision-maker as regards the development of any real estate opportunities by the petitioner. 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).

Counsel's assertion that the beneficiary out sources the conversion of land to buildable lots and the promotion to sell the lots while retaining managerial control is also not persuasive. As noted above, the beneficiary does not retain managerial control rather the management committee retains managerial control of the companies or individuals that are responsible for the conversion of land to buildable lots and the subsequent promotion of those lots for sale. For example, the management agreement requires that the management committee "appoint or engage any consultant, land surveyor or engineer," and "enter into any agreement with the City or any planning authority for or in connection with the planning, re-zoning, subdividing or developing the Planned Area." Further, the management agreement requires that the management committee "[a]ward, sign or otherwise enter into any agreement for the construction of Municipal Services," and "[e]nter into any agreement for the listing for sale, or for the sale or other disposition of the Planned Area or any part thereof." The beneficiary's authority to manage the organization is severely restricted by contract and the definitions of major decisions in the contract requiring the management committee's approval.

The record does not support a finding that the beneficiary exercises discretion over the day-to-day operations of the petitioner or functions at a senior level within the organizational hierarchy. The description of the beneficiary's job duties does not reveal what the beneficiary is doing on a daily basis. The beneficiary indicates he spends approximately twenty-five percent of his time on administrative tasks and the other seventy-five percent identifying and developing real estate opportunities, converting the land to finished lots and promoting the lots for sale. As noted above, identifying real estate opportunities is a task the beneficiary performs and is not an executive task by its nature. The latter two tasks, converting the land to finished lots and promoting the lots for sale are tasks out sourced to others. Counsel's assertion that the

beneficiary directs or somehow manages the city engineer of West Fargo has no basis in the record. It seems that a city engineer would be directed or managed by his or her superior, not by an outside source, however knowledgeable that source might be. 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 petitioner has not provided copies of the agreement or agreements with the advertising company that is referred to as its surrogate marketing department. The statement by the president of an advertising company that indicates it does business with the petitioner is not sufficient to establish that the beneficiary manages this company through its principal. Further, the management agreement restricts the beneficiary from exercising his discretion in "approve[ing] a standard form of sale agreement and selling and/or marketing criteria for the Planned Area."

Upon review of the record, the petitioner has not established that the beneficiary manages or directs the management of the organization or a function of the organization. The petitioner has not established that the beneficiary establishes the goals and policies of the organization or supervises and controls the work of other supervisory, professional or managerial employees. All "major decisions" regarding the petitioner are left to the petitioner's management committee and not to the beneficiary. The record does not support a finding that the beneficiary exercises wide latitude in discretionary decision-making or exercises discretion over the day-to-day operations of the petitioner. The record does not contain a sufficient description of the beneficiary's daily activities and does not demonstrate that the beneficiary is managing the organization through the work of others. The record does not establish that the beneficiary is acting in a managerial or executive capacity as defined by the Act.

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.