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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.
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Washington, D.C. 20536

[redacted]

File: WAC 00 167 53518 Office: CALIFORNIA SERVICE CENTER Date: JUN 2 1 2002

IN RE: Petitioner: [redacted]
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)

PUBLIC COPY

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Arizona and is engaged in computer software development. 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 established that the beneficiary had been or would be employed in an executive or managerial capacity.

On appeal, the petitioner submits a letter to expand on the responsibilities of the beneficiary.

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):
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> * * *
>
> (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 petitioner was incorporated in the state of Arizona in December of 1997. The petitioner claimed gross receipts in the amount of $229,940 for the year 1998. Regarding the ownership of the company, the petitioner provided undated minutes of a meeting of its board of directors wherein the petitioner issued 100,000 shares of stock to the beneficiary. The petitioner also provided two illegible stock certificates and a page apparently taken from minutes of a meeting of its board of directors on April 4, 2000 wherein the petitioner issued 60,000 shares of stock to the beneficiary and 40,000 shares of stock to another individual.

The primary issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
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> 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).

In a letter submitted with the initial petition, the petitioner outlined the beneficiary's primary duties as follows:

> a) to look after all day to day affairs of the business including the development of a corporate strategy for future growth and profitability,
> b) to be responsible for all matters regarding the company's finances,
> c) to direct the development of software products and services,
> d) to ensure that marketing and sales efforts are in

line with the company's business plan,
e) to enter into agreements with various suppliers in order to meet objectives, including office space leases, utility/telephone services, strategic alliances with other software product/support organizations,
f) to establish corporate direction and to ensure adequate resources, both human and financial in order to meet goals,
g) to be the final decision [sic] regarding all matters pertaining to the company's direction and growth,
h) to define job positions and interview candidates for the various positions that the company has/will have.

The director requested that the petitioner provide its organizational chart and a more detailed description of the beneficiary's duties, including the employees under the beneficiary's direction. The director also requested that the petitioner submit a list of employees, its Internal Revenue Service (IRS) Form 941 Quarterly Wage Report for the previous four quarters and a payroll summary with IRS Form W-2s evidencing wages paid to employees.

In response to the director's request the petitioner provided the following description of the beneficiary's responsibilities:

1) Overall general office management from a high level perspective,
2) Hiring of staff,
3) Managing cash flow,
4) Corporate direction and planning,
5) Review and approval for all contract and work opportunities,
6) Provide direction and approval for all advertising done by the office,
7) Approval for all office equipment acquisitions,
8) Responsible for all leases and other commitments, which bind the company.

The petitioner also noted that "[e]ssentially, all staff report to [the beneficiary]" and that "as the company grows, more managers will be added." The petitioner also provided IRS W-2 Wage and Tax Statements for three employees for the year 1999. The petitioner further provided its Arizona Unemployment Tax and Wage Report (Arizona report) for the quarter ending December 1999 showing two employees in October and November and one employee in December. The petitioner also included its Arizona report for the quarter ending March 31, 2000 showing two employees and its Arizona report for the quarter ending June 30, 2000 showing one employee. The petitioner also provided its Arizona report for the quarter ending September 30, 2000 showing one employee in July, four employees in August and five employees in September. The petitioner also explained that its name had been changed to eScribe, though no supporting documentation was provided.

The director determined that the record provided insufficient detail regarding the actual duties to be performed by the beneficiary. The director also determined that the record indicated that a preponderance of the beneficiary's duties involved providing services to the company. The director further found that the petitioner's evidence did not establish that the beneficiary would be managing a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, the petitioner asserts that it is hiring highly skilled and specialized professionals and that the hiring is an ongoing process. The petitioner also states that it is a start up company and that the beneficiary is required to wear many hats. The petitioner also provides the below additional description of the beneficiary's duties.

> The applicant [sic] originally directed the organization in all aspects to ensure that the business establishes itself. As staff was added, responsibility shifted to those people. This included office administrators, sales people and project managers. Before these staff were added and trained to perform the jobs according to the policies established by the applicant, time was spent either ensuring that needed tasks were completed or that staff understood how their jobs were to be performed.
>
> The applicant being the one setting up the operation in Phoenix, was the only person who knew the goals and purpose of eScribe and as such was required to undertake all activities initially to establish it. This included (on the technical side): type of equipment, software development methodologies and coding local ethnic and ethical aspects, (on the sales side): establish policies as to type of work to be sought as well as value and required skill sets, (on the administration side): establishing policies regarding control of inventory and customer relations. The applicant was also responsible for the enforcement of these policies by the staff up to and including termination.
>
> As already indicated, the applicant is completely responsible for the success of the operation. Since this a [sic] high tech software development company, its ever changing business model required the applicant to be able to redirect activities to those that are in demand or are best suited to achieving the goals of the corporation. Industry leaders such as Microsoft issue, on a frequent basis, new tools and techniques that aid software developers in their tasks. The decision as to these tools requires constant attention such that the

> direction of the company can remain focused. As has been demonstrated in the past (most recently by failures of dot coms), choosing the wrong technology for themselves or clients can lead to failure of the company.

The petitioner also noted that the phrase "receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization" effectively describes the beneficiary.

Upon review, the petitioner'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 general position description that vaguely refers, in part, to duties such as looking after the day-to-day affairs of the business, ensuring that marketing and sales efforts are in line with the company's business plan and being responsible for the company finances. The response to the director's request for evidence provided even less insight into the beneficiary's daily activities. 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.

Furthermore, the duties of the beneficiary, such as entering into agreements with various suppliers, defining job positions and interviewing candidates, overall general office management, reviewing and approving advertising and approving office equipment acquisitions, are more indicative of an individual that is primarily performing the basic operations of the company. 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 addition, though petitioner indicates that it is hiring highly skilled and specialized professionals this statement is unsupported by the record. 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 position descriptions for any of its employees.

Finally, the petitioner's elaboration upon the beneficiary's duties in the appeal fails to provide a concrete description of the beneficiary's daily activities. We note also that the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As such, evidence previously

available to the petitioner but not provided until an appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

The petitioner's reference to hiring additional employees subsequent to filing the petition does not contribute to its filing eligibility at the time of filing the petition. At the time of filing the petition the petitioner was a three-year old company that employed one individual and had employed the maximum of three individuals in the past. Upon review of the record, the petitioner has not established that at the time of filing, it employed sufficient staff to relieve the beneficiary from performing non-qualifying duties. Based on the reasonable needs of the company, it does not appear that the reasonable needs of the petitioning company might be met by the beneficiary and one or two employees.

The record contains insufficient evidence to demonstrate that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director the petitioner has not established a qualifying relationship with a foreign entity.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

The director specifically requested evidence on the issue of ownership of the Canadian entity and ownership of the United States entity. The petitioner's provision of inconsistent information relating to the ownership of the United States entity in the form of minutes of two different board meetings is insufficient to establish ownership and control of the United States entity. 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). Upon a thorough review of the record, there is no information regarding the ownership of the Canadian entity.

Upon review, the petitioner has not established that a qualifying

relationship exists between the petitioner and the claimed foreign entity. For this additional reason the petition may not be approved.

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.