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U.S. Department of Justice

Immigration and Naturalization Service

prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 00 084 50241 Office: VERMONT SERVICE CENTER Date: JUN 24 2002

IN RE: Petitioner:
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

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the state of New York in January of 1998. The petitioner is engaged in the sale of beauty aids, cosmetics and facials and the import and export 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 established that the beneficiary had been or would be engaged in a primarily managerial or executive position.

On appeal, counsel asserts that the petitioner has submitted sufficient documentation to establish that the beneficiary has been and will be performing the duties of 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.

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.

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).

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

> [The beneficiary] continues in her role as President of [the petitioner]. As such, she oversees all strategic operations of the company, including hiring and management of the support staff. Because of the nature of the company's business, beauty products and services, the maintenance of a knowledgeable staff is key to sales.

The petitioner also included an organizational chart depicting the beneficiary as managing director, a manager, a supervisor and one full-time in-house staff and two part-time in-house staff. The chart also included six distribution agents and two independent sales agents.

The petitioner further provided its Internal Revenue Service (IRS)

form 1120, U.S. Corporation Income Tax Return for the year 1998. The 1998 IRS Form 1120 revealed gross receipts in the amount of $10,330, no compensation paid to officers and no salaries or commissions paid for the year.

The director requested additional documentary evidence showing the beneficiary had been employed in an executive or managerial capacity in the United States. The director specifically requested evidence of the petitioner's staffing in the United States including the number of employees, their duties and how they were paid. The director also requested a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis for the United States company. The director further requested the petitioner's IRS Form 1120 for the year 1999.

In response, petitioner through its counsel stated that:

> The duties and responsibilities demanded of [the beneficiary] in her role as Managing Director of [the petitioner] are vast and varying from day to day. In general, [the beneficiary's] duties revolve around three areas: supervising staffs [sic], developing business strategy and facilitating relationships with executives of major suppliers and distributors. Due to the importance of each of those areas, in an average workweek, [the beneficiary] evenly divides her time among the three work functions.

The petitioner also included a list of the beneficiary's duties as follows:

> (a) to [sic] supervise all staffs [sic] including Salesmen and Estheticians;
> (b) to [sic] chair all staff meeting [sic] on all administrative Matters [sic];
> (c) To liaise [sic] all key executive [sic] and senior representative [sic] of supplier [sic] and manufacturers;
> (d) to develop business strategy and supervise its implementation;
> (e) To supervise and approve technical training and international beauty shows in which [the petitioner] will attend;
> (f) To supervise and develop business plan for special skin care products series;
> (g) to supervise all other issues including advertisement, promotion conference and sales

The petitioner also provided a list of the duties for the other purported employees. The petitioner further provided a copy of an unsigned 1999 IRS Form 1120 that revealed gross receipts in the amount of $162,331, compensation paid to the beneficiary as an

officer in the amount of $28,500 and salaries paid in the amount of $5,680.

The petitioner also included its New York Form NYS-45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the quarters ending September 30, 1999, March 31, 2000, June 30, 2000 and September 30, 2000. The September 30, 1999 NYS-45 revealed two employees, the March 31, 2000 report revealed three employees, the June 30, 2000 report revealed three employees and the September 30, 2000 report revealed two employees. The NYS-45 reports identified the beneficiary and an esthetician/supervisor as the two employees and the beneficiary, esthetician/supervisor and a manager as the three employees.

It is noted that the petitioner never clarified 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The director determined that the record was insufficient to establish that the beneficiary had been or would be performing the duties of an executive or manager. The director determined that the petitioner had not established the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve her from performing the services of the company. The director concluded that the size and nature of the petitioner would not support an executive or managerial position.

On appeal, counsel for the petitioner re-states the previous descriptions for the beneficiary's job position but provides a different hourly breakdown of the beneficiary's weekly duties. Counsel states that the beneficiary spends approximately ten hours supervising and directing the company staff, approximately twenty-three hours developing business strategy and coordinating business operations and seven hours developing relationships with other companies. Counsel also states that the "salary expense in 1999 is not the correct reflection as to the revenue of $162,331 in 1999 and shall not be taken as a sole factor denying Petitioner's I-140 application." Counsel finally asserts that the petitioner is expanding.

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). The petitioner's description of the job duties is not sufficient to warrant a finding of managerial or executive job duties. In the initial petition, the petitioner stated that the beneficiary "oversees all strategic operations of the company, including hiring and management of the support staff." This description

does not provide sufficient detail to understand what the beneficiary does on a daily basis.

In response to the director's request for evidence, the petitioner provided a list of duties that was also overly broad, vaguely referring, in part, to duties such as "chair all staff meeting [sic]," and "develop business strategy and supervise its implementation." Counsel's statement that the beneficiary spends approximately twenty-three hours developing business strategy and coordinating business operations without providing further detail does not further enhance the understanding of what the beneficiary does on a day-to-day basis. Furthermore, the number of hours spent on this vaguely described activity is inconsistent with the number of hours provided in the response to the director's request for evidence. 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 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.

In addition, duties listed by the petitioner indicate that the beneficiary is primarily performing the basic operations of the company. Regarding the actual operations of the petitioner, the description of the beneficiary's job duties states that the beneficiary is responsible for "liaise[ing] [sic] all key executive[s] and senior representative[s]" and counsel indicates that this takes up seven to thirteen hours of the beneficiary's workweek. Based on the record the beneficiary is performing this non-qualifying task rather than managing it. Furthermore, the petitioner has provided insufficient documentary evidence of full-time subordinate staff that are performing the petitioner's advertising, promotion, sales and training tasks. 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 record indicates that the beneficiary is providing the necessary services to the petitioner to allow its continued operation. 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 of Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

Further, the petitioner's description of the beneficiary's supervisory tasks coupled with the evidence contained in the record indicate that at most the beneficiary is a first-line supervisor of non-professional, non-managerial and non-supervisory employees. The organizational chart provided by the petitioner and the description of employees' job duties is not supported by

documentary evidence. As noted above, 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, supra. The petitioner has provided supporting evidence of only two to three employees in 1999 and 2000. As noted by the director, the wages paid to these individuals indicate that they are non-managerial and part-time employees.

Counsel's statement that the "salary expense in 1999 is not the correct reflection as to the revenue of $162,331 in 1999 and shall not be taken as a sole factor denying Petitioner's I-140 application," is confusing at best. If counsel is attempting to assert that the size of the petitioner is not the sole factor to consider in concluding that an individual is or is not a manager or executive, he is correct. However, in the case at hand, the petitioner was a year-old business that claimed to have gross receipts in 1999 of $162,331. The petitioner provided documentation of only two to three employees, all with managerial or supervisory titles. Based on the record, it does not appear that the reasonable needs of the petitioner might plausibly be met by the services of the beneficiary as the managing director and two managerial employees. 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. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility. 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 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 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 description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non qualifying duties. The Service is not compel ed to deem the beneficiary to be a manager or an executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has provided

inconsistent evidence regarding its ownership and control. The petitioner indicates that it is wholly owned by the beneficiary and provides a stock certificate to illustrate this claim. However, the record contains copies of the petitioner's tax returns which indicate that the corporation is not wholly owned by the beneficiary and further represent that no foreign individual or entity maintains an ownership interest in the company. The 1998 IRS 1120 Schedule K states at line 4 that the company is not a subsidiary of any parent company or group, and further indicates at line 10 that no foreign person or corporation owns more than 25 percent of the company's stock. The petitioner's 1999 IRS 1120 provides the same information on schedule K at line 10 as noted above. Again, 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, supra. Because the appeal is dismissed for the reasons stated above, this issue is not examined further.

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.