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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:

Office: NEBRASKA SERVICE CENTER

Date: 15 MAR 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 Director of the Nebraska Service Center denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Washington State denture clinic that seeks to employ the beneficiary as its manager and, therefore, endeavors to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition because the evidence did not establish that the petitioner currently employs and would continue to employ the beneficiary in a primarily executive or managerial capacity.

On appeal, counsel submits a brief. Counsel argues, in part, that the approval of an L-1A petition on the beneficiary's behalf should be sufficient to approve the instant I-140 petition.

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 director denied the petition because the petitioner failed to show that the beneficiary functioned primarily as an executive, as a functional manager, or as the manager of other managerial, supervisory or professional employees. The director noted that the beneficiary was one of only two employees, with the beneficiary acting as a manager, and the other employee acting as a laboratory denture technician. The director found that this organizational structure did not lead to a conclusion that the beneficiary is, and would be, primarily engaged in directing the management of the organization, or in managing the organization through others.

On appeal, counsel presents two arguments.

First, counsel asks the director "if the [b]eneficiary . . . has not been primarily engaged with directing the management of the Petitioner or its major components or functions, . . . who has been responsible for its substantial growth . . . ?" Counsel asserts that the beneficiary is the only person who establishes the goals and policies of the petitioner, as well as all of the petitioner's essential functions. Counsel notes that the regulation does not preclude a beneficiary from being engaged in the production of goods and/or services, only that such tasks not be the primary job responsibility of the beneficiary. Counsel further states that since the filing of the petition the petitioner has hired three additional employees, which will allow the beneficiary to devote even more of this time to executing executive or managerial duties.

Second, counsel states that the director's decision was in error because it did not follow a January 13, 1989 Service memorandum from [REDACTED] Assistant Commissioner for Adjudications, regarding the adjudication of I-140 petitions that are based on the same facts and issues in a previously-approved L-1A petition.

Counsel has not presented a persuasive argument on appeal. As the record is presently constituted, the evidence does not support a finding that the beneficiary is currently employed and will continue to be employed in a primarily executive or managerial capacity.

It is important to note that the merits of this case are being judged according to the organizational structure of the petitioner at the time the petition was filed on June 7, 1999. The Service is focusing solely on the petitioner's operations and staffing levels as they existed at that time because a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

Therefore, while counsel states on appeal that the petitioner hired three additional employees in the year 2000, these new facts will not be considered. A determination on this appeal will be made based on whether the organizational structure, at the time the petition was filed, could have supported a primarily executive or managerial position. If the petitioner would like the Service to consider any increase in staff or additional duties of its employees, the petitioner should file a new I-140 petition so that the Service may fully consider this information.

The record reflects that at the time the petitioner filed the Form I-140, it employed two individuals on a full-time basis. These

employees were the beneficiary and a laboratory denture technician. The petitioner also listed the beneficiary's job responsibilities according to the following categories:

- ❖ Office management and marketing - 25 hours out of a 65-hour work week
- ❖ Clinical services - 8 hours out of a 65-hour work week
- ❖ Denture production - 6 hours out of a 65-hour work week
- ❖ Lab work - 6 hours out of a 65-hour work week
- ❖ Consultations - 12 hours out of a 65-hour work week<sup>1</sup>

In order to be found eligible for this immigrant visa classification as an executive, the record must clearly show that the beneficiary primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

See. 8 C.F.R. 204.5(j)(2).

The beneficiary's job responsibilities indicate that the primary amount of his time is devoted to providing the goods and/services of the petitioner's business operations, rather than directing the management of the organization, establishing the goals and policies of the organization, or exercising discretionary decision-making authority.

For example, out of 57 work hours, the beneficiary spends approximately 44% of his time (25 work hours) executing office management and marketing duties, and the other 56% of his time (32 work hours) providing the services that are essential to the petitioner's operations such as providing clinical services, producing dentures, working in the laboratory, and consulting with clients. Clearly, the beneficiary's provision of the essential services of the petitioner is the primary focus of the

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<sup>1</sup> It is noted that the petitioner accounts for only 57 hours out of a 65-hour work week. The Service assumes that the remaining 8 hours per week include breaks for lunch, etc. Therefore, the 57 hours will be referred to in this decision as "work hours."

beneficiary's job duties, not any executive duties. Furthermore, although the petitioner states that the beneficiary spends 25 work hours on management and marketing duties, some of the tasks that are listed under this general category are not considered executive functions. These tasks include, but are not limited to; "ordering supplies and equipment as needed," "keeping inventory on clinical and lab supplies," and "dealing with dental insurance companies on filed claims." Such tasks are administrative functions that are not executive in nature. Accordingly, the petitioner does not sufficiently establish that the proffered position involves primarily executive duties.

In order to be found eligible for this immigrant visa classification as a manager, the record must clearly show that the beneficiary primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

See. 8 C.F.R. 204.5(j)(2).

The petitioner also fails to show that the proffered position involves primarily managerial functions. While it appears that the beneficiary has the authority to hire and fire personnel, the evidence is not sufficient to establish that the beneficiary manages the organization, or a function of the organization. On appeal, counsel claims that the beneficiary is a functional manager and "is responsible for all the essential functions of the Petitioner - marketing, public relations, finance, personnel administration, [and] denture production." However, counsel does not explain how the beneficiary manages the marketing, public relations and finance functions. The petitioner does not employ

any marketing, public relations or finance personnel, and the petitioner does not indicate that it contracts these services through other companies or individuals.<sup>2</sup> Thus, it has not been clearly articulated what would constitute the management of these tasks by the beneficiary.

In addition, the director found that the beneficiary does not supervise managerial, supervisory, or professional employees, as he was merely a first-line supervisor to a non-professional laboratory denture technician. On appeal, counsel states that the position of laboratory denture technician is a professional position, as the Department of Labor's (DOL) Dictionary of Occupational Titles (DOT) gives it an SVP rating of 7, the same rating as a computer programmer. Counsel also states that the petitioner's employee works as a denturist trainee, not as a laboratory denture technician. According to counsel, a denturist trainee needs more sophisticated skills than a laboratory denture technician.

The Service does not agree with counsel's argument that the position of the petitioner's other employee is professional in nature. The DOT classification system that counsel refers to on appeal is not directly related to determining membership in a profession. The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the DOL in the various editions of the Occupational Outlook Handbook ("Handbook"). The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

According to the Handbook, dental laboratory technicians fill prescriptions for crowns, bridges, dentures, and other dental prosthetics and can specialize in one of five areas: orthodontic appliances, crowns and bridges, complete dentures, partial dentures, or ceramics. The DOL indicates that most dental laboratory technicians learn their craft on the job, which indicates that the position is not professional in nature, as a baccalaureate degree is not required for its successful completion. Thus, the Service does not concur with counsel that the beneficiary manages a professional employee.

The size of a company, by itself, is not a determining factor in this petition, but the petitioner does maintain the burden of proving that it has the necessary staff to ensure that the

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<sup>2</sup> The petitioner only claims that the petitioner contracts with other companies for the production of dentures, not for any other services.

beneficiary can devote the primary amount of his time to executing purely executive or managerial functions. The petitioner has failed to convince this office that the beneficiary merits this immigrant visa classification.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.