



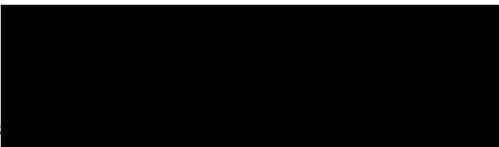
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U.S. Department of Justice

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 00 095 53187

Office: CALIFORNIA SERVICE CENTER

Date: MAY 03 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

Myra L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California 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 California corporation that claims to be engaged in the import and export business. It seeks to employ the beneficiary as its chief operating officer 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 in the record did not support a finding that the petitioner currently employs and would continue to employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel submits a brief. Counsel states, in part, that the beneficiary works primarily as an executive or, in the alternative, as a manager of an essential function.

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 found that the beneficiary was not working primarily as an executive or manager because the beneficiary supervised two warehouse personnel and one secretary. According to the director, this type of organizational structure in an export and import business indicated that the beneficiary was merely a first-line supervisor to non-managerial, non-supervisory, and non-professional employees. The director further stated that the petitioner's organizational structure made it "unreasonable to believe that the beneficiary . . . will not be involved with the day-to-day non-supervisory duties that are common place in the

industry."

On appeal, counsel states that the beneficiary is eligible for immigrant visa classification as either an executive or manager.

Regarding classification as an executive, counsel states that the beneficiary manages the petitioner's sales, marketing and distribution by negotiating with vendors and customers and guiding the petitioner's expansion efforts. Regarding classification as a manager, counsel states that the beneficiary manages an essential function. Although counsel does not explicitly state the essential function that the beneficiary allegedly manages, counsel suggests that the function is the petitioner's entire operations.

As the record is presently constituted, the Service does not find that the proffered position meets the definition of executive capacity or managerial capacity.

Pursuant to 8 C.F.R. 204.5(j)(2):

Executive capacity means an assignment within an organization in which the employee 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.

Managerial capacity means an assignment within an organization in which the employee 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.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. Champion World, Inc. v. I.N.S., 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir.(Wash.)). (Emphasis in the original.)

The petitioner outlines the beneficiary's job duties as:

[The beneficiary] has full responsibility for all issues regarding the sales, marketing and distribution of [the petitioner's] products in North America. He negotiates contracts, employs staff as needed. He makes decisions as [sic] include logistics, acquisitions and growth of [the petitioner].

Here, the petitioner does not outline the beneficiary's actual job duties. The petitioner merely presents a broad job description for the beneficiary that does not provide any meaningful insight into the beneficiary's daily activities. "Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations." Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F. 2d 41 (2d. Cir. 1990).¹

For example, the petitioner states that the beneficiary is responsible for issues regarding sales, marketing and distribution. However, the petitioner does not explain who performs the sales, marketing and distribution activities for the petitioner, or what "issues" may arise for which the beneficiary is responsible. The petitioner states that it employs two warehouse employees and one secretary in addition to the beneficiary. There is no evidence that anyone but the

¹ The court in Fedin Bros. Co., Ltd. v. Sava also noted that "[t]he actual duties themselves reveal the true nature of the employment." See id. at 1108.

beneficiary performs the sales, marketing and distribution activities, given the petitioner's staffing levels. 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 (BIA 1988).

Similarly, merely stating that the beneficiary "makes decisions" regarding various aspects of the petitioner's operations is not sufficient evidence of the beneficiary's employment in a primarily executive or managerial capacity.

The Service notes that an individual who works in an executive or managerial capacity may perform duties that would not generally be classified as executive or managerial level tasks. However, the petitioner bears the burden of establishing that the beneficiary primarily executes executive or managerial duties and any non-executive or non-managerial duties are merely incidental to the position. In this case, the petitioner has not met its burden of showing that the beneficiary directs the management of the organization or manages an essential function on a primary basis. Therefore, the beneficiary is not eligible for classification as a multinational executive or manager.

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.