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U.S. Department of Justice

Immigration and Naturalization Service

identification date deleted to 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: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 13 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 visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in the distribution of oil filtration systems for use in industry. 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. The director also determined that the record was insufficient to establish that the foreign entity was doing business as defined in the regulations.

On appeal, counsel for the petitioner submits a brief. Counsel for the petitioner asserts that the evidence shows that the beneficiary conducts executive and managerial duties. Counsel further asserts that the petitioner's parent company is conducting business and that it has recently been acquired by another multinational corporation.

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 petitioner was incorporated in the state of Tennessee in August of 1996. The petitioner claimed gross receipts in the amount of $91,125 for the year 1999. At the time of filing the petition and the response to the request for evidence by the director the petitioner appeared to be wholly owned by Exportnet, Ltd., a British company. On appeal, counsel for the petitioner asserts that another British company has acquired the petitioner.

The first 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] will oversee and direct the entire operation. [The beneficiary] has been instrumental in our initial planning and technical operations. He will now develop and oversee long-term goals and objectives for [the petitioner] with emphasis on continued market

infiltration and expanded sales activities.

The letter also referred to an attached exhibit purportedly describing the petitioner's "staff of either regular employees, contract workers, or independent service providers."

In response to the director's request to submit evidence of the petitioner's employee's including quarterly federal or state payroll tax returns, federal income tax returns, a list of the employees by name and title and role in the company, the petitioner provided a copy of its Tennessee Department of Labor and Workforce Development Report for the quarter ending June 30, 2000. This form indicated that the petitioner had two employees, the beneficiary and the co-director. The petitioner also provided a copy of its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1999. The IRS Form 1120 indicated that $5,206.66 had been paid to officers of the petitioner and $13,855.27 had been paid in commissions. The petitioner also provided copies of five invoices from the petitioner to various individuals. The organizational chart identified these individuals as independent contractors. The organizational chart also identified the beneficiary not only as the chief operating officer but also an independent contractor. The petitioner further included an affidavit from the co-director stating that the petitioner had paid $2,671 in commissions for the three-month period of August through October of 2000. Counsel for the petitioner asserted that the petitioner employed two direct employees, twenty-two sales contractors, and two manufacturing contractors.

The petitioner also included a brief description of the beneficiary's job description as follows:

> Oversee and direct company operations. Establish short-term and long-term goals and policies for the company. Plan and develop continued market infiltration and expanded sales activities. Direct the management of company. Supervise and control the work of employees and independent contractors in carrying out the day-to-day work of the company directly or through subordinate managers. Hire, fire, and promote employees and independent contractors.

Counsel for the petitioner also asserted that the beneficiary met the criteria for both an executive and a manager.

The director determined that the evidence submitted did not demonstrate that the petitioner had employees who would relieve the beneficiary from performing the day-to-day duties of the company.

On appeal, counsel for the petitioner asserts that the beneficiary "directs the overall operations" of the petitioner and "oversees

the long-term goals for the company". Counsel further asserts that the beneficiary "supervises and directs the professional staff of administrators and contractors in performing the day to day duties of the company." Counsel asserts that because the beneficiary supervises professional employees, he is "de facto functioning in a managerial capacity." Counsel points out that the petitioner paid sales commissions to four sales contractors in the year 2000 and acknowledges that the commissions paid were small but claims that the company is growing. Counsel concludes that the evidence demonstrates that the beneficiary is an executive/manager.

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 description of the beneficiary's job duties is vague and general in nature, essentially serving to paraphrase certain elements of the statutory definition of managerial and executive capacity. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position. In addition, a number of the contracts and invoices submitted with the initial petition were addressed to or signed by the beneficiary. In addition, the petitioner's advertising brochure requests potential customers to call Richard or Sara for more information on the company's products. The only "Richard" employed by the petitioner is the beneficiary. The documents reflect that the beneficiary has arranged shipping, has set up basic services for the petitioner and is the company contact for persons interested in information on the petitioner's product. Upon review of the record, the beneficiary 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).

Further, counsel asserts in the response to the request for evidence that the petitioner employed two direct employees, twenty-two sales contractors, and two manufacturing contractors but on appeal acknowledges that the evidence only reflects sales commissions paid to four sales contractors. Counsel then attempts to characterize the sales contractors as professional employees and the beneficiary's "supervision" of the sales contractors as necessarily managerial as defined by regulation. Counsel's assertions, again are not persuasive. First, counsel's assertions 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). Second, the record demonstrates only that the petitioner employs two individuals. The commissions paid to the contractors do not evidence that the independent contractors are paid on anything other than an intermittent and part-time basis. Third, despite counsel's assertions to the contrary, the

contractors are not considered professional employees under the Act. Section 101(a)(32) of the Act states that the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers. The record is devoid of any information that would characterize the contractor's work as anything other than sales personnel.

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 description of the duties to be performed by the beneficiary does not demonstrate 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 will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. 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.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with a foreign entity if the petitioner cannot establish that the foreign entity is still a viable company doing business.

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.

At the time of filing the petition and the request by the director for additional evidence, the petitioner was claiming a qualifying relationship with the foreign entity, Exportnet, Ltd. On appeal, we must look at the petitioner's filing eligibility at the time the application or petition is filed. Subsequent transfers of stock, even if properly substantiated, which is not the situation in this case, will not be considered. As such, the foreign entity in this case is Exportnet, Ltd.

In the initial petition, the petitioner indicated that the foreign entity engaged in the business activity of "identifying, penetrating and setting up business opportunities around the world." The petitioner indicated that the foreign entity's business "is based on the premise that personal contact, networking and hard work are the keys to success."

The director pointed out that the foreign entity was 98 percent

owned by the beneficiary and had submitted only a Report of the Director [the beneficiary] and Financial Statement through June 30, 1999 for the record. The director determined from this statement that the foreign entity had sales of less than $19,000 for the one-year period ending June 30, 1999. Despite the director's request for financial information for the complete year of 1999 and for 2000, the director noted that the petitioner provided only a few invoices from the foreign entity to itself for the year 2000. The director further noted that the record did not provide information regarding wages paid to employees of the foreign entity or that the foreign entity was providing regular and systematic services for the years 1999 and 2000. Based on the lack of information in the record, the director concluded that the petitioner's parent company was no longer doing business as defined by the regulation.

On appeal, counsel for the petitioner provides an unsigned and unidentified document that allegedly lists employees and salaries for the foreign entity for the years 1999 and 2000. As noted above, counsel's brief then focuses on the purported transfer of the ownership of Exportnet, Ltd., the petitioner's parent company, to a different British company.

Upon review of the record, the petitioner has not established that it has a qualifying relationship with a company that continues to do business. 8 C.F.R. 214.2(l)(1)(ii)(H) states:

> *Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

At most, the petitioner has provided evidence that the foreign entity in this case has an office and the beneficiary is acting as an agent abroad. The documentation provided does not establish that the foreign entity is conducting business in a regular, systematic, and continuous way. The invoices between the petitioner and the foreign entity show only that the beneficiary, acting as an agent for the foreign entity, is a conduit for the transfer of a limited number of products to the petitioner. The purported list of employees is not supported by independent sources. 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 sufficient evidence to overcome the director's determination that the foreign entity is not conducting business as defined by the regulation.

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.