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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: [Redacted]

Office: VERMONT SERVICE CENTER

Date: NOV - 4 2002

IN RE: Petitioner: [Redacted]
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:



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 approved by the Director, Vermont Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New Jersey corporation engaged in the import and export business. It seeks to employ the beneficiary as its president. Accordingly, it seeks to classify 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 initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the United States company and revoked the approval of the petition.

On appeal, counsel for the petitioner asserts that the petition was improperly revoked and that the Service's findings are erroneous as a result of a misinterpretation of the facts presented.

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.

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.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

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.

The petitioner initially provided a list of the beneficiary's duties including the following:

- performing essential executive functions of president of the company in all aspects of business decision making, policy making and personnel management;
- establishing the company management structure, office rules, operation guidelines, and communication protocol between offices abroad and within the U.S.;
- formulating immediate goals for expansion and long term business policies in accordance with the parent company's direction;
- ensuring our company's compliance with regulations, guidelines, business direction and profit goals established and mandated by the parent company;
- directing the preparation of financial plans and annual budget reports for the parent company's review;
- guiding the company through the web of American, Chinese and other international laws and regulations concerning the import and export of goods;
- researching and familiarizing himself [sic] with the American and Chinese markets as well as the relationship between the two markets;
- amending and/or modifying company's directions in response to the changing markets;
- meeting and/or discussing with parent company to form cooperative effort in response to the changing market;
- personally hosting or delegating the responsibility of hosting potential and/or current clients and customers of the company;
- personally hosting and entertaining officers of the parent company in New York;
- creating new company directives in an effort to expand business;
- exercising wide latitude in discretionary decision-making power and receiving only general direction from parent company;
- exercising personnel management authority concerning hiring, discharging, promoting and transferring of subordinates; and
- committing 90% of her time to performing executive

duties.

The petitioner also provided its organizational chart depicting the beneficiary as president, a business manager and two supporting staff.

The director requested further evidence including a detailed description of the beneficiary's proposed executive and/or managerial job duties. In the petitioner's April 1999 response, the petitioner stated the following:

[The beneficiary], as the President of [the petitioner] is responsible for all the decision making for the company's business planning and development, as well as the business scope, investment projects, annual budget planning and the allocation of profits, etc. She is also responsible for solely directing the company's business activities, and in [sic] charge of the company's internal daily operation. She has to draft and approve the regulations of the company, and to announce the approved regulations to each subordinates [sic] of the company for them to carry out. [The beneficiary] also represents the company in handling the business with foreign customers.

The petitioner also stated that the beneficiary had absolute personnel management power and is and would be the sole decision-maker on behalf of the petitioner. The petitioner concluded that the beneficiary's duties would be managerial in nature not only because she had absolute decision-making power but also because she would be overseeing professional workers, such as a financial manager and sales managers. The petitioner also provided a list of the beneficiary's current duties for the petitioner on a weekly basis as follows:

- 8 hours - holding meetings with managers in the company; discussing the progress of each department's business activities; reviewing reports prepared by department managers; making suggestions to improve the efficiency of each department's operations.
- 10 hours - formulating the company's policies in long-term expansion, business scopes and investment projects, etc.
- 1 hour - exercising personnel management authority.
- 10 hours - directing and supervising the daily operational [sic] of the departments of the company, including reviewing, approving and signing off of each department's business plans, proposals, business reports, budget reports, personnel evaluation reports and other internal and external documents.
- 5 hours - studying and understanding the matters concerning the company's business's trends, making suggestions in resolving problems faced by the company's business and discussing with the managers.

6 hours - flexible hours reserved for emergency calls, such as attending the company's special meetings, attendance of customers, holding of interviews with employees of the company, etc.

The petitioner also stated that there were five subordinate positions under the beneficiary.

As noted above, the director initially approved the petition based on the above information. Upon subsequent review, however, the director properly issued a notice of intent to revoke. The petitioner responded to the director's notice of intent to revoke in November of 2000. The petitioner stated that the beneficiary would be employed in a primarily managerial and executive position. The petitioner provided copies of various agreements signed by the beneficiary as evidence that the beneficiary was employed in a managerial and executive position. The petitioner also stated that the beneficiary supervised the company's sales and finance managers. The petitioner explained that its primary responsibility was to develop products, coordinate shipment of goods from China to the United States and to implement distribution strategies through relationships with outside contractors.

The director determined that the petitioner's description of the duties of its staff was insufficient to establish that the beneficiary's position had been and would be primarily managerial or executive in nature. The director found that the documentation submitted failed to establish who performed the preponderance of the mundane duties necessary to support the petitioner's international trade activities. The director concluded that the petitioner had not demonstrated that the beneficiary would be employed in a managerial or executive capacity in an organization the size of the petitioner. The director further concluded that the beneficiary would be primarily performing the non-managerial, day-to-day operations of providing services to the petitioner's customers.

On appeal, counsel for the petitioner asserts that the Service must give the petitioner the grounds for the revocation as provided in the Act. Counsel cites 8 C.F.R. 214.2(L)(9)(iii) in support of his assertion and states that the Service failed to comply with this regulatory requirement. Counsel also asserts that the Service's findings are clearly erroneous because the evidence of the record conclusively establishes that the beneficiary holds both a managerial and an executive position.

It is noted that neither counsel nor the petitioner effectively clarified whether the beneficiary is claiming 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. On appeal, counsel asserts that the beneficiary meets the criteria set forth in the definition of both managerial and executive

capacity. However, the petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel's assertions that the beneficiary meets the criteria for either an executive or a manager 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 provided a general description of the proposed duties of the beneficiary referring vaguely to duties such as establishing the management structure, formulating goals of the company, and modifying the company's direction. These general statements appear to relate in part to duties involved in setting up a new company not managing or directing a company that is already established. It is not possible to determine from the general description provided whether the beneficiary is performing managerial or executive duties with respect to these various activities or whether the beneficiary is actually performing the activities. The petitioner also indicated that the beneficiary would be ensuring and guiding the company's compliance with various laws and regulations. Although, this duty may have complex attributes, the petitioner has failed to show how performing this basic function for the petitioner is an executive or managerial duty. The petitioner also notes that the beneficiary is directing the preparation of financial plans but at the time the petition was filed, the petitioner had not hired anyone for the beneficiary to direct in this capacity. It appears the beneficiary was the individual performing the financial functions for the petitioner at the time the petition was filed. 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 response to the request for evidence the petitioner again provided a broad statement indicating that the beneficiary was responsible for all the decision making of the company and that she directed the company's business activities. The statement that the beneficiary formulates policies is likewise vague and general in nature. Statements made up of generalities do not convey an understanding of what the beneficiary is actually doing on a daily basis. The petitioner attempted to clarify the beneficiary's weekly responsibilities by providing an overview of the beneficiary's workweek. The petitioner stated that the beneficiary spent 8 hours a week meeting with managers. Although by this time, the petitioner apparently had hired a financial manager, the petitioner confirms that this manager only worked for the petitioner for three months. It is unclear if the beneficiary

continued to meet with the one other "manager" for 8 hours each week before and after the employment of the financial manager or the time spent in meeting with managers increased or decreased with the absence of a financial manager. The petitioner also states that the beneficiary studied business trends, assisted in the resolution of problems, and "discussed with managers" for an additional 5 hours each week. As noted above, the petitioner employed only one "manager" reporting to the beneficiary except for a brief three-month period. The record does not further address the details of these meetings. The record contains insufficient information to conclude that the beneficiary is primarily performing executive or managerial functions in the meetings rather than carrying out the basic operations of the company. The beneficiary's direction and supervision of the operations of the company's departments including review and approval of business plans, budget reports, and proposals, is not sufficiently detailed to conclude that the beneficiary is acting in a primarily executive or managerial capacity rather than performing the functions for the petitioner. Furthermore, the petitioner provided no supporting documentation of business plans, reports, or proposals. Finally, the breakdown of duties does not take into account certain general duties described initially that were more indicative of an individual performing basic operations of the petitioner. The breakdown of duties also does not take into account the assertion of counsel on appeal that the beneficiary has been responsible for the supervision of the sourcing operations in China. 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).

Counsel's assertions on appeal as well as the petitioner's rebuttal to the notice of revocation do not further support a conclusion that the beneficiary is either a manager or an executive. In describing the beneficiary's executive duties, counsel simply re-states the elements contained in the executive definition. The record does not contain sufficient information to assume that the beneficiary is an executive of the petitioner as defined by the Act.

Counsel and the petitioner focus on the beneficiary's purported managerial duties to conclude that she qualifies as a manager under the Act. Counsel asserts that the beneficiary is not a first-line supervisor because she supervised a finance manager and a sales manager and the sales manager supervised two assistants and outside contractor sales companies. As noted above, the record contains evidence that the finance manager was employed for a three-month period some time after the initial petition was filed. A petitioner must establish eligibility at the time filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of

Katigbak, 14 I&N Dec. 45,49 (Comm. 1971). The supervision of the financial manager does not contribute to finding that the beneficiary was employed as a manager. Also as noted above, the petitioner did not employ an individual who was performing this duty leaving the Service to conclude that the beneficiary would be primarily responsible for performing the financial duties of the petitioner. The record is unclear regarding the beneficiary's supervision of the sales manager, the sales assistants and outside contractors. The breakdown of the beneficiary's weekly duties is too general to conclude that the beneficiary is primarily supervising the sales manager. The breakdown of duties provides that the beneficiary spends one hour a week exercising personnel management authority. It is unclear whether the meetings with "managers" and the hours spent supervising the daily operations of the departments of the company requires a majority of the beneficiary's time. As noted above, the petitioner's description of supervising the daily operations is not sufficiently detailed. The description of duties and the evidence supplied by the petitioner do not clearly demonstrate that the beneficiary is primarily acting in a managerial capacity. The petitioner cannot conclude that the beneficiary has met the criteria to qualify under this visa classification by describing some duties that could be indicative of a manager, other duties that merely restate the statutory definition of an executive, duties involving supervision of employees not in the United States and not employed by the petitioner, and yet other duties that are indicative of an individual performing services for the petitioner. The petitioner has not sufficiently established that the beneficiary will be acting primarily in a managerial capacity.

Counsel's assertion that the Service cannot consider staffing levels of the petitioner without also considering the reasonable needs of the petitioner is correct. It appears that the director did base his decision partially on the size of the petitioner and the number of staff and failed to take into account the reasonable needs of the company in light of the overall purpose and stage of development of the company. However, at the time of filing, the petitioner was a year and a half old importing and exporting company that claimed a gross income of \$3,893,206. The petitioner provided evidence that it employed the beneficiary as president, plus a sales manager, two sales assistants, and two outside contractors. Although the sales manager, sales assistants, and outside contractors appear to perform the everyday sales function of the petitioner, the petitioner has not established who performs all other mundane activities of the petitioner. In light of the lack of information on this issue and the lack of consistent information on the beneficiary's day-to-day duties it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Regardless, the reasonable needs of the petitioner serve only as a factor when 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.

Finally, counsel's citation to 8 C.F.R. 214.2(L)(9)(iii) is inapplicable to the case at hand. Counsel cites this regulatory requirement and asserts that the Service filed to comply with this regulatory requirement in revoking the petition. However, the regulation cited applies to the revocation of petitions approved pursuant to Section 101(a)(15)(L) of the Act, 8 U.S.C. 1101(a)(15)(L).

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are general and fail to consistently describe her actual day-to-day duties. The record does not adequately demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her 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 or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

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.