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U.S. Department of Justice
Immigration and Naturalization Service

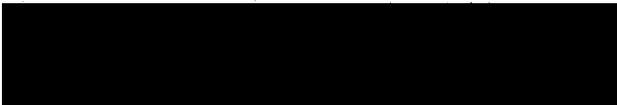
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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 01 105 54731 Office: CALIFORNIA SERVICE CENTER Date: **NOV 13 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 employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in 1997. It is engaged in the international trade of lumber. It seeks to employ the beneficiary as its branch manager. Accordingly, the petitioner endeavors 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 determined that the petitioner had not established that the beneficiary's duties had been or would be primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the director ignored the beneficiary's management responsibilities. Counsel also asserts that the director's decision was improperly based upon the petitioner's staffing levels without taking into consideration its reasonable needs.

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 language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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).

The issue in this proceeding is whether the beneficiary has been and will be primarily 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.

It is noted that the petitioner requests consideration for the beneficiary's classification as a branch manager. However, the petitioner does not clarify whether the beneficiary claims to be engaged solely in managerial duties under section 101(a)(44)(A) of the Act, or is also requesting consideration of the beneficiary's purported 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. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

In a letter submitted with the initial petition, the petitioner stated that the beneficiary would be responsible for all operations of the company. The petitioner provided the following information regarding the beneficiary's job duties:

He will direct and coordinate all activities through subordinate personnel. He will make all decisions regarding the company's business operation. He will have authority to bind the company to contracts. He will have unlimited authority to allocate funds within the company's budget. He will, of course, hire and fire employees. He will make direct decisions regarding personnel matters that relate to subordinate managers. He will have final authority on personnel matters that relate to all employees. Direct management of all employees other than subordinate managers will be directed by the respective department managers.

The petitioner also provided the following job descriptions for its other employees:

Contract Manager:

Direct purchasing activities. Arrange contracts with suppliers. Be responsible for company records and handle communications between the U.S. company and the parent company. Arrange documentation needed for international trade.

Office Administrator:

Direct and participate in bookkeeping, payroll preparation, accounting preparation of tax returns, arrange international banking. Managing [sic] external accounting service. Direct all clerical activities.

Purchaser:

Conduct all activities involved with the purchasing of materials and products for distribution and export under direction of Contract Manager. Locates available products, negotiates details of purchase contracts, inspect products, coordinate with corporate secretary to obtain relative [sic] documents for international transactions, make purchases.

Office Clerk:

Perform clerical tasks as requested by office administrator and other management personnel. Answer telephone, take messages, greet business callers.

The director requested a more detailed description of the beneficiary's duties in the United States.

In response to the director's request the petitioner through its counsel provided the following description of the beneficiary's duties in the United States:

15 % of his time is spent on public relation issues. He's responsible for professional and community liaison, represents the company as the legal representative. Hosts Chinese business dignitaries. Negotiates adjustment and resolutions on contract disputes.

35 % of his time is spent on the company's daily operations and communications with the overseas company. He receives directives from the Board of Directors in China. He also receives information, product request, product inquiry and devises methods on how to obtain the information and how reliable they are [sic]. He receives financial report from Office Administrator. Exams, evaluates them, obtains additional information as needed. Finds potential problems and positive actions [sic]. Approves payment, signs checks, and authorizes banking transactions. He needs to travel to parent company as required (4 times a year minimum) to attend annual meeting, submitting reports to the board of directors. He makes all personnel decisions such as employee's vacation, leave, and sets compensation. He receives reports and recommendations regarding other personnel within the firm. He makes final decision on unusual decision [sic] other employees. He authorizes [sic] to hire or fire all personnel, however, only exercises this

through contract manager and office administrator.

50 % of his time is spent on the products. He receives product proposals and samples of the grade specification of lumber, compares with product proposals. He selects highest level of qualification and suitability. He compiles information regarding reputation, reliability and good business practice of the various suppliers. The task involves extensive domestic site travel, accompanied by the Purchaser, in [sic] inspection [sic] new suppliers operation, overall quality and consistence quality before he makes decisions.

The director determined that given the petitioner's type of business, it was unreasonable to believe that the beneficiary would not be involved with day-to-day non-supervisory duties that are commonplace in the international trade business. The director also determined that it was unreasonable for the petitioner to employ 50 percent of its workforce as managers. The director stated that the beneficiary would in actuality function as a first-line supervisor of non-professional employees. The director concluded that the petitioner had not established that beneficiary's duties were primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the director did not consider the reasonable needs of the company when considering the staffing levels of the petitioner. Counsel also asserts that the director ignored the beneficiary's "responsibility for the overall function of the company, or the company's vital function of product development, community liaison, and liaison between [the petitioner] and the Board of Directors of the parent company." Counsel further asserts that the beneficiary's expertise is vital to the development of a product line and suppliers for the parent company in China. Counsel finally asserts that product development, public relations, and overseeing company operations are managerial functions.

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). In the initial petition, the petitioner submitted a broad position description that vaguely refers, in part, to duties such as "direct[ing] and coordinate[ing] all activities through subordinate personnel," "make[ing] all decisions regarding the company's business operation," and "hire[ing] and fire[ing] employees." The position description also provided unclear language regarding management and decisions relating to subordinate employees. The initial position description did not convey an understanding of the beneficiary's daily activities and whether the activities were

primarily managerial or executive in nature.

In response to the director's request for evidence the petitioner through its counsel provided a breakdown of the beneficiary's responsibilities and indicated that the beneficiary spent 15% of his time on public relations, 35% of his time on daily operations including communicating with the parent company, and 50% of his time on product development.

On appeal, counsel asserts that product development is a managerial function. However, the petitioner's description of the duties performed by the beneficiary relative to product development is more indicative of an individual performing the necessary tasks to locate the right kind of product and to negotiate and sign the agreements necessary to purchase the right product from suppliers. 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). Moreover, the tasks carried out by the beneficiary in relation to product development are somewhat duplicative of the tasks carried out by the petitioner's purchaser. The beneficiary apparently brings his expertise to the task of identifying the product. However, expertise in a specific area does not make the task carried out a managerial task. The petitioner does not sufficiently describe the roles played by the beneficiary and the purchaser in locating and inspecting suppliers of materials suitable for the petitioner's export. Contrary to counsel's assertion that product development is a managerial function, in this case, product development is a task necessary to produce the goods for export.

The beneficiary's responsibilities regarding public relations are not necessarily managerial functions. First, it appears that the beneficiary's duties regarding public relations are not his primary function. Second, the beneficiary as the figurehead of the petitioner carries out the public relation function. The petitioner has not provided sufficient evidence to support counsel's conclusion that the beneficiary's involvement in public relations is a primary duty or a managerial activity.

It is not possible to discern from the petitioner's description of the beneficiary's responsibilities regarding daily operations of the petitioner whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing these activities. It appears that many of the beneficiary's tasks relate to the performance of services for the petitioner as a first-line supervisor. The petitioner's description of its employee's job duties does not support a finding that the beneficiary directs the management of the petitioner or actually directs other managers. The reporting hierarchy of the petitioner is confusing and not clearly stated. 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 record does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision, or component of the company. Rather, the description of the duties to be performed by the beneficiary are more indicative of an individual primarily performing the basic operations of the petitioner. 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.

Although it appears the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a three-year-old trading company that claimed to have a gross annual income of \$2,307,228. The firm employed the beneficiary as branch manager, a contract manager, an office administrator, a purchaser, and an office clerk. The petitioner has not provided sufficient evidence to conclude that the beneficiary's position is a necessary one or that the business requires an organizational structure where 60 percent of the staff are purportedly managerial or executive employees. It is not possible to determine if the reasonable needs of the company required an additional layer of manager(s), rather than an expert on wood products at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

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.