

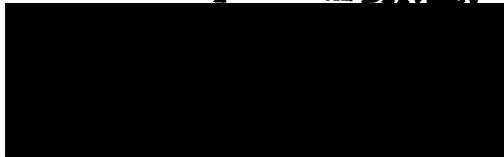


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U.S. Department of Justice
Immigration and Naturalization Service

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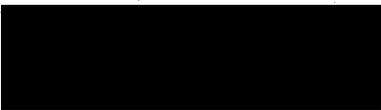
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 01 155 51550 Office: CALIFORNIA SERVICE CENTER Date:

NOV 19 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 limited liability company that operates a women's apparel store. It seeks to employ the beneficiary as its president. Accordingly, it 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 executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the petitioner has established that the beneficiary performs all four elements of the managerial definition. Counsel also asserts that the director did not consider the petitioner's complete description of the beneficiary's job duties in reaching his conclusion that the beneficiary had been and would be primarily a first-line supervisor. Counsel also submits a notice of approval dated August 19, 2002 for this beneficiary's classification as an L-1A non-immigrant. Counsel also provides a copy of the petitioner's organizational chart submitted with the petitioner's L-1A petition. Counsel requests that this additional evidence be considered noting that the director's subsequent decision is inconsistent with its denial of the petition in this proceeding.

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.

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

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 counsel for the petitioner asserts that the beneficiary meets the criteria of a "manager" as defined under section 101(a)(44)(A) of the Act. However, the petitioner paraphrases certain elements of the criteria for an "executive" as defined under section 101(a)(44)(B) as well. 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.

The petitioner initially stated that the beneficiary directed, organized, and supervised the operation of the business. The petitioner also stated that the beneficiary planned, established policies, controlled buying and selling of merchandise in the United States and abroad, conducted market research to identify the needs of the primary market, and planned the advertising.

The petitioner also provided its organizational chart depicting the beneficiary as president, his wife and co-owner of the business also as president, a manager, and three sales people.

The director requested a more detailed description of the beneficiary's duties in the United States. The director also requested an explanation of the two positions of president and how the beneficiary qualified as a multinational manager or executive.

In response, the petitioner provided the following description of the beneficiary's duties and responsibilities:

[H]e directs the management of the organization by providing and outlining rules, policies and procedures that are carried out internationally by the staff members. He establishes the goals and policies of the international organization and exercise [sic] wide

latitude in discretionary decision-making. He receives no general supervision whatsoever, rather, he and the other Co-President of the organization decide the objectives of the international organization jointly and then jointly determine the best way in which to execute those objectives. The beneficiary manages the U.S. operations and the Co-President manages the Mexican operations.

The petitioner provided examples of the beneficiary's discretionary decision making as follows:

The beneficiary determines the labels and styles of stock the organization makes available to the public on a daily basis. It is [the beneficiary] who negotiates prices and quantities paid by the organization to suppliers and in turn sets the prices for the public.

The petitioner also stated that the beneficiary acted as a manager for the United States operation as follows:

He supervises and controls the work of his sales staff. Additionally he contracts and supervise [sic] the work of other professionals such as attorneys, and accountants. He maintains the authority to hire, train, promote, and fire all sales staff in the Chula Vista location, and to approve all employee work schedules. He is responsible for the direction of the Chula Vista location in accordance with the goals and policies he and the Co-President have set forth. There is no other employee in the Chula Vista location who maintains the level of authority held by [the beneficiary].

The director determined that the beneficiary would be a first-line supervisor of non-professional employees.

On appeal, counsel for the petitioner cites several unpublished decisions relating to determinations made on non-immigrant petitions. Counsel asserts that the director failed to consider all the beneficiary's duties when concluding that the beneficiary was a first-line supervisor and not an executive or manager. Counsel also asserts that the beneficiary employs an accountant and an attorney as well as contracting with architects. Counsel submits a revised organizational chart for the petitioner. The revised chart depicts the beneficiary as president, the beneficiary's wife and former co-president as vice-president, a manager, an assistant manager, and three sales personnel. The chart also depicts contractors, designers, manufacturers, an attorney and an accountant as working with or for the beneficiary. Counsel finally asserts that the director's decision was in error as the evidence demonstrates that the beneficiary is a manager since he performs all four elements of a manager's duties.

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 paraphrased two elements of the definition of executive capacity and added that the beneficiary was also responsible for market research, planning the advertising, and also controlled the buying and selling of merchandise. The initial description although not comprehensive indicates that the beneficiary will be providing basic services necessary to operate a clothing store. 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).

The petitioner's description of the beneficiary's duties in response to the director's request for evidence again paraphrases elements of the definition of executive capacity without describing the beneficiary's daily activities. The petitioner's example of the beneficiary's decision making again is indicative of an individual providing the necessary services to operate a clothing store. The petitioner notes that the beneficiary decides on the type of stock to carry and negotiates the prices and quantities. The petitioner further indicates that the beneficiary "supervises and controls the work of his sales staff," and contracts and supervises his attorney and accountant. The record does not detail the duties of the sales manager or the sales representatives. The record does not reveal the amount of time the beneficiary allocates to contracting and supervising his attorney and accountant. 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 record does not establish that the beneficiary is primarily performing in a managerial or executive capacity.

Contrary to counsel's conclusion that the beneficiary meets all four elements found in the definition of managerial capacity, the record does not reveal that the beneficiary primarily manages the organization as required under the definition. The evidence of record indicates that the beneficiary is primarily performing the basic operations of the company. He is buying the goods, negotiating the prices, and supervising a small staff. The record does not reveal that any of the petitioner's subordinate employees relieve the beneficiary from providing these everyday services. As noted above, an employee providing services to the petitioner does not contribute to a finding that the beneficiary is primarily an executive or manager. Matter of Church Scientology International, supra.

Counsel's citation to unpublished cases is without merit. Counsel has furnished no evidence to establish that the facts of the

instant petition are in any way analogous to those in the cited cases. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

Counsel's submission of the subsequent Service approval of an L-1A classification for the beneficiary does not contribute to a finding of eligibility for the beneficiary in this proceeding. First, the petitioner apparently submitted a revised organizational chart for the subsequent non-immigrant proceeding. The revised organizational chart depicts additional levels of "managerial" employees, and depicts the former co-president as vice-president providing yet another tier in the petitioner's organizational hierarchy. Neither counsel nor petitioner provide any independent documentary evidence to demonstrate that the additional "managerial" employees and outside contractors were employed by the petitioner at the time this immigrant 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). Second, the Administrative Appeal Office's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the Administrative Appeals Office. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the rulings of service centers that are contradictory. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000). Third, if the subsequent non-immigrant petition was approved based on similar unsupported information comparable to the information contained in the current record, the approval would constitute clear and gross error on the part of the Service. The director is also reminded that all subsequently filed petitions should be held in abeyance while an appeal is pending on the same or similar matters. In the present matter, the director should review the subsequently approved petition and determine whether that approval should be subject to revocation pursuant to section 205 of the Act.

The petitioner has not submitted sufficient evidence with the petition nor the notice of appeal to overcome the director's decision. The description of the beneficiary's duties and responsibilities is general in nature and does not describe in detail the beneficiary's duties on a day-to-day basis. The record is insufficient to demonstrate that the beneficiary manages the organization, or a department, subdivision, function, or component of the organization or directs the management of the organization or a major component or function of the organization. In addition, the record reveals that at the time of filing the petition, the petitioner did not have a staff sufficient to relieve the beneficiary from performing non-qualifying duties. The record does not sufficiently demonstrate that the majority of the beneficiary's actual daily activities have been and will be

managerial or executive in nature rather than primarily performing the services necessary to continue the operation of the company.

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.