

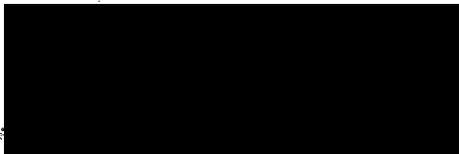


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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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Washington, D.C. 20536



File: WAC 01 155 52700 Office: CALIFORNIA SERVICE CENTER Date:

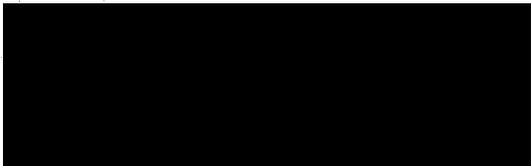
NOV 19 2002

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 company organized in the Territory of Guam in 1997. It is engaged in the operation of a retail tire business and also is engaged in selling construction supplies. 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 beneficiary owns and manages all aspects of a company that has been in business since 1979, that has eight employees including an assistant general manager, and has gross income in excess of \$550,000 for the year 2001.

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 had been and would 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.

The petitioner initially stated that the beneficiary would be employed in a managerial capacity. The petitioner stated that in this position the beneficiary would:

- (a) Manage all aspects of the petitioner's business. Petitioner owns and operates Life Water, a water system business, a retail sales business.
- (b) Supervise and control the work of other supervisory employees and manage all essential functions of the petitioner.
- (c) Have the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) for other employees he directly supervises; and
- (d) Exercise discretion over the day-to-day operations of the business.

The director requested a more detailed description of the beneficiary duties in the United States. The director also requested a description of job duties for all the employees under the beneficiary's supervision.

In response, the petitioner stated that:

The beneficiary is the President of the company and performs the duties of a manager. He manages all aspects of the organization. He supervises and controls the work of an Assistant General Manager, a Sales Manager and an Operations Manager. He has the authority and does hire and fire staff. He exercises discretion in the day to day operations of the organization.

The petitioner also stated that:

The Assistant General Manager operates the business as directed by the President. The Sales Manager is in charge of the retail store and sales to major customers such as the military. The Operations Manager is in charge of the warehouse, the deliveries and the business office.

The petitioner also provided its organizational chart depicting

the beneficiary as president with the assistant general manager reporting to him. The chart also depicted a sales division and an operation division with individuals employed as heads of the divisions. The chart finally depicted two employees working in the warehouse and two employees working in bookkeeping positions. The petitioner also provided a list of its employees and noted that two of its eight employees were employed in part-time positions.

The director determined that the beneficiary would be a first-line supervisor of non-professional employees and that the beneficiary would also be involved in day-to-day non-supervisory duties that are commonplace in the industry. The director concluded that the record did not support a finding that the beneficiary had been or would be employed in a primarily managerial or executive capacity or that the petitioner required an executive or managerial position.

On appeal, counsel for the petitioner asserts that the beneficiary owns and manages all aspects of the company. Counsel submits the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 2001 and its IRS Form W-2GU, Guam Wage and Tax Statements for eight employees for the year 2001.

Counsel's assertion and evidence submitted 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 the elements found in the definition of managerial capacity without describing the actual duties of the beneficiary with respect to daily operations. The petitioner's only detail in the description confuses the petitioner's business with apparently the petitioner's claimed parent company's business.

In response to the director's request for a more comprehensive description of the beneficiary's duties, the petitioner stated that the beneficiary "supervises and controls the work of an Assistant General Manager, a Sales Manager and an Operations Manager." The petitioner did not provide further detail on the beneficiary's duties but again re-stated elements of the definition of managerial capacity. The petitioner offered conclusory statements indicating that the assistant general manager operated the business as directed by the president and that the sales and operations managers were in charge of their respective departments. However, insufficient details were offered regarding their actual daily duties. 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 Service is unable to determine from the limited information provided whether the beneficiary is performing

managerial duties with respect to the operation of the petitioner or whether the beneficiary is actually performing the necessary operations of the petitioner. 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 record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or 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 fail to describe the actual day-to-day duties of the beneficiary. In addition, the position description primarily paraphrases the statutory definition of managerial capacity. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that 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 has managed or 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 or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner did not submit evidence to establish that the beneficiary had been employed by the claimed parent company abroad in a managerial or executive capacity for at least one year in the three years preceding entry as a non-immigrant, as required by 8 C.F.R. 204.5(j)(3)(i)(B). The petitioner again simply paraphrased the definition of managerial capacity when describing the beneficiary's duties for the claimed parent company. As noted above, such vague detail is not sufficient to establish that the beneficiary has been employed in a managerial capacity.

Also, beyond the decision of the director, the petitioner has not established a qualifying relationship with a foreign entity. 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. The petitioner has submitted confusing documentation with regard to its ownership. Although the petitioner claims that it is indirectly owned by a foreign entity, the petitioner's IRS Forms 1120 do not support such a finding. At Schedule K, Line 5, the petitioner represents that no corporation owns directly or indirectly 50 percent or more of the corporation's voting stock. At Line 7(c), also on Schedule K, the petitioner represents that

no foreign person (which includes a foreign corporation) owns directly or indirectly 25 percent or more of the total value or the total classes of its stock. Furthermore, we note that the petitioner referred to the beneficiary as its owner in the brief information provided regarding the beneficiary's duties. Likewise, counsel on appeal, referenced the beneficiary as the owner of the petitioner. 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).

As the appeal will be dismissed for the reasons stated above, these issues are not examined further.

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.