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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

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 19 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, 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 State of California in June of 1995. It is engaged in the business of selling embroidered linens, including tablecloths, toppers, doilies, place mats, aprons, comforter covers and coordinating accessories, crochet, and crystal lace. 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's position involves significant authority over operation of the petitioner's company and that the beneficiary will perform an essential function at the managerial or executive level. Counsel asserts that the beneficiary will not function as a first-line supervisor.

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 has 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-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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 as the petitioner's president had been "supervising, directing and controlling the corporation's business and its officers, employees and agents, including the right to employ, discharge and prescribe the duties and compensation of all officers, employees and agents of the corporation."

The petitioner also stated that it exhibited its products at trade shows several times a year, took its products to two major markets every week, and also had eight established retail customers. The petitioner further provided its California DE-6, Quarterly Wage Reports for the last quarter of 1999 and the first two quarters of 2000. The DE-6 Form for the last quarter of 1999 reflected two employees and the DE-6 Forms for the first two quarters of 2000 reflected three employees. The petitioner's financial statement as of September 30, 2000 revealed salaries and wages in the amount of $15,600 of which $8,000 was distributed to an officer.

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. The director further requested a copy of the petitioner's organizational chart.

In response, the petitioner provided the following description of the duties performed by the beneficiary:

> As the president of our company, [the beneficiary] is responsible for all the affairs of the company and receives only general supervision or direction from the board of directors. He supervises, directs and controls the corporation's business, operations, its officers, employees and agents, including the right to employ, discharge and prescribe the duties and compensation of all officers, employees and agents of the corporation. [The beneficiary] spends about seventy percent of his time on these duties. He spends about thirty percent time [sic] on negotiating commercial contracts and other matters on behalf of our company with other companies, and supervising the

performance of the contracts entered.

The petitioner also stated that the beneficiary had established specific goals and policies for the petitioner including, setting up a branch office in New York, the feasibility of opening a retail store, negotiating to be the representative of other Chinese companies, and hiring and firing employees.

The petitioner also provided its organizational chart depicting the beneficiary as president, a general manager who also held a position in the accounting department, a sales department manager, and a warehouse and shipping manager. The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the fiscal year beginning June 1, 1999 through May 31, 2000. The Form 1120 revealed gross receipts in the amount of $274,483, taxable income in the amount of $5,585, compensation of officers in the amount of $24,000, and that $17,800 was paid in salaries. The petitioner further provided its income statement for the period of June 1, 2000 through April 30, 2001. The income statement revealed gross receipts of $344,034.80, net income of $10,140.71, compensation of officers in the amount of $22,000, and that $20,600 was paid in salaries.

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.

On appeal, counsel for the petitioner asserts that the beneficiary's position involves significant authority over generalized policy of the petitioner. Counsel also asserts that the beneficiary cannot be a first-line supervisor because the beneficiary does not primarily perform the tasks necessary to produce a product or to provide services. Counsel further asserts that the beneficiary will supervise professional employees and indicates that the petitioner has recently hired an individual with a masters in business administration to be its marketing manager. Counsel concludes that the beneficiary's position involves significant authority over the operation of the company and that the beneficiary will perform an essential function at the managerial or executive level.

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 petitioner submitted a broad and general description of the beneficiary's duties for the petitioner. The petitioner simply states that the beneficiary is responsible for the affairs of the company and supervises the petitioner's business and employees and that this takes up seventy

percent of the beneficiary's time. However, upon review of the record at the time the petition was filed the petitioner indicates that the primary operation of its business is attending trade shows and flea markets. Moreover, the petitioner had only three part-time employees in addition to the beneficiary and paid those employees only $17,800 in salaries for the fiscal year ending May 31, 2000 and $20,600 in the next eleven months. The vague description of the beneficiary's duties in light of the petitioner's business and its number of part-time employees does not convey a realistic understanding of what the beneficiary will be doing on a daily basis.

In addition, although the petitioner states that the beneficiary spends seventy percent of his time supervising and directing the operations of the petitioner and its employees, the record does not provide sufficient evidence to support this statement. 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 director requested a brief description of the duties of all the employees under the beneficiary's supervision but the petitioner failed to provide this information. As such, the Service cannot differentiate between the necessary mundane tasks performed by the beneficiary for the petitioner and the activities performed by the part-time employees. The petitioner also did not submit evidence to establish that the beneficiary had actually conducted the tasks necessary to open a branch office or a retail store.

Further, counsel has not provided any evidence to support his assertion that the beneficiary is not primarily a first-line supervisor over non-professional employees. The Associate Commissioner notes that counsel has provided the resume of an individual recently hired by the petitioner and alleges that based on the resume the marketing manager position is a professional one. However, the fact that an individual has a professional degree does not automatically make the individual's position a professional position. Counsel's assertion to the contrary, the petitioner has provided no evidence that a marketing manager's position is a managerial position. The assertions of counsel 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). Furthermore, the new marketing manager position filled by a new employee cannot contribute to a finding of eligibility at the time the petition was filed. A petitioner must establish eligibility at the time of 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 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. 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 has not sufficiently established its ability to pay the beneficiary the proffered wage of $54,000 per year. The petitioner has not provided evidence that it has paid the beneficiary even half the proffered wage in the past. The IRS Form 1120 and the petitioner's income statement both reveal that the petitioner's net income does not allow for the increase in the beneficiary's wage of $30,000 or more. As the appeal will be dismissed for the reason stated above, this issue is 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.