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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:

Office: TEXAS SERVICE CENTER

Date: OCT 04 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, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in the business of providing construction products and services for residential and commercial projects throughout the United States and Canada. 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 determined that the petitioner had not established that the beneficiary had worked in a primarily managerial or executive capacity for the foreign company and would not be acting in a primarily executive or managerial capacity for the United States company.

Counsel for the petitioner requests oral argument "to argue the important legal principal that the Service cannot ignore prior findings of managerial or executive capacity when there is no gross error in the prior findings." Oral argument is limited to cases where cause is shown. 8 C.F.R. 103.3(b). It must be shown that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, as discussed in detail below, the issue counsel requests to address has been resolved. As such, no cause for oral argument is shown. Therefore, the request is denied.

On appeal, counsel for the petitioner asserts that the Service erred in not following the precedent decision established by the approval of the petitioner's L-1A petition. Counsel also asserts that the Service erred in disregarding evidence that the beneficiary served the foreign entity in a managerial capacity and erred in disregarding the beneficiary's role in managing two individuals in management positions with the United States company.

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 petitioner was incorporated in the State of North Carolina in July of 1996. The petitioner is jointly owned by two Canadian entities. The beneficiary holds the title of president for one of the Canadian entities.

The first issue in this proceeding is whether the petitioner has established that the beneficiary has been employed in a primarily managerial or executive capacity for the foreign entity in one of the three years preceding his entry into the United States as a non-immigrant.

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 described the beneficiary as an executive for the foreign entity with the following duties:

[The beneficiary] was responsible for supervising the operation and marketing of the company's industrial and commercial construction services. [The beneficiary] continues in this capacity.

The petitioner also provided an organizational chart of the beneficiary's foreign employer depicting the beneficiary as president, an administrator, a project manager, a job site foreman, an individual in accounting, and miscellaneous suppliers.

The director requested a definitive statement from the foreign company describing the job duties of the beneficiary.

In response, the petitioner submitted a letter from the foreign company's administrator describing the beneficiary's duties as follows:

He was responsible for supervising the operation and

marketing of the company's industrial and commercial construction services. [The beneficiary's] duties were to plan, develop and establish policies and objectives of the business organization. He exercised wide latitude in determining the direction of the company's industrial and commercial construction services. [The beneficiary's] duties and responsibilities were executive and managerial in nature. He was the ultimate supervisor of all employees. He had complete out [sic]. In the past year of his employment with us, [the beneficiary] focused on the development of the "Granite Program", a software/networking concept which would allow our sister company, [the petitioner], to grow its dealer network, broaden its industry presence and increase overall sales all without an increase in operating expenses. Upon its completion, we licensed the program to our sister company. In this capacity [the beneficiary] worked daily in developing this project.

The letter also set out the beneficiary's duties for the foreign company into several components as follows:

Marketing & Sales	35%
Estimating & Review	25%
Project Management	20%
Customer Service	10%
Administration	10%

The letter further stated that the beneficiary supervised four individuals including the office administrator, the bookkeeping/cost-control/accounting manager, the project manager/estimator, and job site foreman. The letter also stated that the office administrator, the accounting manager, and the project manager were professional positions and that the position of job site foreman required extensive experience. The letter concluded by stating that the beneficiary had "ultimate authority over the work of all individuals in the company," and that "he functioned at a senior level within the corporation," and that "[the beneficiary] held a managerial position within our organization."

The director determined that the development of a software networking concept and customer service were not duties that were primarily managerial or executive in nature. The director further determined, based on the information provided by the petitioner in response to the request for evidence, that the beneficiary performed the day-to-day marketing duties for the foreign company. The director concluded that the record did not establish that he beneficiary worked in a primarily managerial or executive capacity for the foreign entity.

On appeal, counsel asserts that the Service is obligated to rely

on prior findings of manager or executive status. Counsel notes that the petitioner filed an L-1A petition for the beneficiary on the same day that this immigrant petition was filed and that the L-1A petition was approved. Counsel further asserts that there was no gross error in the approval of the prior L-1A petition. Counsel concludes that the record and the detailed specific duties of the beneficiary demonstrate that the beneficiary was involved in the overall management of the foreign entity.

Counsel's conclusion is in error. 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 broad description of the beneficiary's duties for the foreign entity, simply indicating that the beneficiary was responsible for supervising the operation and marketing of the company's industrial and commercial construction services. The director correctly requested more detailed information on the issue of the beneficiary's work for the foreign entity.

In response, the beneficiary's foreign employer stated that the beneficiary planned, developed, and established policies and objectives of the business organization, a statement paraphrasing the second element found in the definition of executive capacity. The foreign employer went on to explain that the beneficiary exercised wide latitude in determining the direction of the company's services, a paraphrase of the third element of the statutory definition of executive capacity. These statements do not provide the necessary detail for the Service to make the determination that the beneficiary was acting in an executive capacity. The statement provided by the foreign employer that the beneficiary was responsible for supervising the operation and marketing of the company's industrial and commercial construction services is vague and again does not provide the necessary detail to make an informed decision regarding the beneficiary's daily activities. The only example of the beneficiary's daily activity provided is that of the beneficiary's development of a software/networking concept. This example is more indicative of an individual performing a service for the foreign entity. The foreign employer does not completely describe how the beneficiary is developing his software/networking concept and it is left to the Service to conclude that the beneficiary must be performing the activities necessary to develop the project. 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). Neither counsel nor the petitioner further enlightens the Service regarding this activity on appeal except to say that this was not the beneficiary's only activity for the foreign entity.

The foreign entity states that the beneficiary is the ultimate supervisor of all employees, but then provides an allocation of

the beneficiary's time that does not include specific time for supervision. The foreign entity's allocation of the beneficiary's time simply provides headings without a description of the beneficiary's duties for each of the components outlined. The Service cannot determine from these headings that the beneficiary is performing any supervisory duties with respect to these duties

Furthermore, the foreign employer concludes that the beneficiary is acting in a managerial capacity based on the beneficiary's supervision of other individuals but does not provide any independent supporting evidence of the employees and whether they are full or part-time employees. The foreign employer further does not provide independent supporting evidence of the claimed professional nature of their work. 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 foreign employer also states that the beneficiary functioned at a senior level within the corporation, again a paraphrase of an element of the definition of managerial capacity, without accompanying detail to describe the beneficiary's daily activities.

It is noted that the petitioner never clarifies whether the beneficiary claims 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. Instead it appears that the petitioner is relying on partial sections of the two statutory definitions in order to be identified as a hybrid "executive/manager." In order to be classified as both a manager and an executive the petitioner must demonstrate that the beneficiary meets all the elements of each definition.

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive 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 adequately demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who have relieved 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 for the foreign entity.

Counsel's assertion that the Service is obligated to approve an immigrant petition based on prior approvals of a nonimmigrant petition is also not persuasive. In the case at hand, the director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition and the record of proceeding does not contain copies of the visa petition that is claimed to have been previously approved. However, if the previous nonimmigrant petition was approved based on the same unsupported statements that are contained in the current record, the approval would constitute clear and gross error on the part of the Service. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, supra at 597. Further, 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).

The second 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.

At the time the petition was filed in July of 2000, the petitioner stated the beneficiary's duties as follows:

[The beneficiary] will be responsible for directing the management of the overall organization, in particular the sales and production departments. [The beneficiary] will continue to develop and implement plans that meet the established goals of the company, goals, which [the beneficiary] himself established during the first year of operation when he was authorized as an L-1A nonimmigrant. Additionally, [the beneficiary] will be developing new goals for the company, including expansion into new markets.

In addition, . . . [the beneficiary] personally developed a "Granite Program" which we are eagerly anticipating his implementing into our company's operation. . . . We would like [the beneficiary] to develop a relationship with the dealer whereas the dealer is using the [petitioner] as the exclusive supplier of related items . . . [The beneficiary] will be responsible for developing this "franchise-like" system and will modify existing procedures to ensure success . . . In the capacity of President [the beneficiary] will have authority to make major business

decisions at his discretion. He will have no other individuals supervising him and will have accountability for his executive decisions only to the shareholders of the company.

In addition to being responsible for the development and integration of the Granite Program into [the petitioner's] existing operation, [the beneficiary], on a day to day basis, will directly manage five individuals.

The position that we are offering [the beneficiary] is truly an executive and managerial one. [The beneficiary] will direct the management of the company's marketing and expansion plans, specifically in the franchise-like Granite Program. He will manage and direct the sales managers. He did establish and will continue to modify and enhance the company's policies and goals as they relate to development of company product lines and the marketing of said products. He . . . will again exercise wide latitude in discretionary decision making. For example, he will make decisions as to the development of a distribution network for our products. He will decide the hiring needs of the company. . . . He will not receive supervision or direction from any higher level executive.

[The beneficiary] will play a dual role involving both the management of the professional sales and production management personnel listed above and the management of an overall major function; the overall management of all aspects of product development (the Granite Program) and marketing.

The petitioner also included position descriptions for the following positions: an office manager who is involved in the day-to-day functions of the office; a production manager who has overall responsibility for managing each customer project; a products manager who is involved in the sales management of the natural stone products division of the petitioner; and a kitchen sales and showroom manager who is responsible for the design and sale of our cabinetry product lines.

The director requested a more specific list of the beneficiary's duties at the United States company, including the percentage of time spent on each duty. The director also requested Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements for all the petitioner's employees in 1999 and 2000

At the time the response was submitted to the Service in March of 2001, the petitioner stated that the beneficiary was responsible for directing the management of the overall organization, but in

particular, the sales and production departments. The petitioner noted that when the beneficiary first returned to the company as an L-1A nonimmigrant, 70 percent of his time was spent installing and implementing the Granite Program (the software program developed by the beneficiary). The remaining time was divided into 15 percent devoted to marketing and sales, 5 percent to customer service, 5 percent to employee management, 5 percent to administration. The petitioner further noted a change in the beneficiary's duties in January of 2001. In January of 2001, the beneficiary devoted 70 percent of his time to re-structuring and hiring, 15 percent in marketing and sales, 5 percent in customer service and 5 percent in administration. The petitioner also noted an anticipated change in the beneficiary's duties at the time the response to the request for evidence was filed. The petitioner stated that the beneficiary would focus 70 percent of his time marketing the new program to new potential dealers and on ensuring that the fabricators would be able to handle the upcoming production demands. The petitioner indicated that the beneficiary would be required to travel to the fabricator sites, meet with stone suppliers, and prepare business and marketing plans. The remaining 30 percent of the beneficiary's time would be spent on employee management (15 percent), customer service (10 percent), and administration (5 percent).

The petitioner also included eleven IRS Form W-2, Wage and Tax Statements for the year 2000.

The director determined that at the time the petition was filed, the beneficiary was involved with the development of a software program and that this was not a primarily managerial or executive duty. The director also determined that after the petition was filed, the beneficiary was involved in restructuring but had not provided an explanation of what this entailed, making it impossible to determine if this duty was primarily managerial or executive in nature. The director further determined that the petitioner indicated that the future duties of the beneficiary would involve marketing but that it appeared that the beneficiary would be performing these duties as no other employee had been assigned these duties. The director concluded that the record did not establish that the beneficiary would be acting in a primarily managerial or executive capacity at the United States company.

On appeal, counsel for the petitioner asserts that the beneficiary's duties are planning, organizing, directing, and controlling major functions of the petitioner through other employees. Counsel also asserts that the Service wrongly concludes that the beneficiary was spending all of his time working on the software project at the time the petition was filed, was spending all of his time on the restructuring project at the time the response to the request for evidence was submitted, and would now be spending all of his time marketing the new software system. Counsel further asserts that the petitioner has consistently represented the beneficiary's duties as those

involving the management of the entire organization. Counsel also asserts that the beneficiary is the only executive level individual within the organization in the position to develop company goals and policies, as all other company workers have specific duties that relate directly to the selling and distribution of the company's products. Counsel finally asserts that the beneficiary meets the criteria for an individual working in an executive or managerial capacity.

Upon review, counsel's assertions are not persuasive. Both counsel and the petitioner repeatedly state that the beneficiary's duties involve managing the entire organization. However, the petitioner has not provided a comprehensive description of the beneficiary's daily duties that supports this conclusion. The examples that the petitioner has provided of the beneficiary's activities at the time the petition was filed are indicative of an individual creating and installing a marketing tool for the petitioner and establishing relationship with outside parties to use the software tool. The petitioner has not provided sufficient evidence to overcome the director's decision on this issue.

In addition, the petitioner stated at the time of filing the petition that the beneficiary spent only 5 percent of his time on employee management. The petitioner's statement that the beneficiary spends only 5 percent of his time in this area does not support a conclusion that the beneficiary's duties are primarily managerial in nature. Even if the Service was to consider the petitioner's anticipated use of the beneficiary's time, the petitioner confirms that the beneficiary will continue to perform the marketing activities of the petitioner and will not devote a significant portion of his time to employment management. Further, counsel's assertion that the beneficiary is the only executive level individual within the organization and that all other workers devote their time to selling and distributing the company's products is not supported by the evidence in the record. 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, supra.

As noted above, the petitioner appears to use portions of the statutory definition of executive capacity and portions of the statutory definition of managerial capacity to attempt to create a hybrid "executive/manager." However, the petitioner has not provided evidence to demonstrate that the beneficiary has primarily served the petitioner in the capacity of a manager or an executive as defined by the statute.

Also as noted above, counsel's reliance on past approvals of L-1A nonimmigrant petitions is misguided. Each petition must fulfill the criteria as set out in the Act and the accompanying regulations. In the case at hand, the petitioner has not provided sufficient evidence that the beneficiary will be working in a primarily managerial or executive capacity for the United



States entity.

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.