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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: [Redacted] Office: TEXAS SERVICE CENTER

Date: OCT 04 2002

IN RE: Petitioner: [Redacted]  
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:



**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 organized in the state of Texas engaged in exporting heavy construction equipment and construction materials and products as well as consulting and engineering. It seeks classification of 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's decision does not adequately articulate the reason for the denial of this petition. However, upon review of the director's succinct decision, the director did note that the petitioner has not established that the beneficiary has been or will be employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service misapplied the Act and that the beneficiary qualifies as a multinational executive or manager.

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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of

the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The petitioner was incorporated in October of 1997. The petitioner stated its gross sales for 1999 exceeded \$427,000. The petitioner offered to employ the beneficiary as its president for an annual salary of \$40,000.

The issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties for the United States enterprise.

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.

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).

It is noted that the petitioner claims the beneficiary is engaged both in managerial duties under section 101(a)(44)(A) of the Act and executive duties under section 101(a)(44)(B) of the Act. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions in an attempt to qualify for this visa classification.

The petitioner initially described the beneficiary's duties for the petitioner as follows:

[The beneficiary] is responsible for the entire company's business operation. As President, [the beneficiary] manages working capital, including accounts and marketable securities. He makes financial forecasts on the capital budget, cash budget, external financing requirements, and financial condition requirements. In addition, [the beneficiary] manages sales promotions and merchandising. He facilitates staff services and is responsible for recruiting future professional support staff.

The petitioner also submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1999. The IRS Form 1120 showed assets of \$6,506, gross receipts of \$34,478, taxable income of \$1,225, and that salaries in the amount of \$12,693 had been paid and that no compensation had been provided to officers of the company. The petitioner also submitted IRS Form 941, Employer's Quarterly Federal Tax Return for the quarters ending in December of 1999 and March of 2000. The IRS Form 941 reflected that the petitioner employed one individual (the beneficiary) in each of these quarters.

The director requested that the petitioner submit evidence of the current staffing level of the petitioner and the job titles and duties performed by the staff.

In response, counsel for the petitioner submitted the current organizational chart for the petitioner. The organizational chart listed a president (the beneficiary), three computer aided drafting employees, three construction employees, one transportation employee and two administrative employees. Counsel also provided the petitioner's IRS Forms 941 for 2000 and the petitioner's 1999 IRS Forms 941 for quarters 1, 2 and 4. All of the IRS Forms 941 listed the beneficiary as the sole employee. Counsel for the petitioner noted that the petitioner employed ten individuals mostly on an independent contractor basis. Counsel also repeated the beneficiary's job duties as previously submitted. Counsel also provided a Dun & Bradstreet Business Information Report that indicated the petitioner employed three individuals. Counsel further stated that the petitioner planned to expand and provided a projected organizational chart for 2000-2003.

In the decision, the director stated:

Documentation submitted with the petition indicates that the petitioning company currently has ten employees nine of which provide services including translations, computer aided design (CAD), painting, plumbing, transportation and installation of floors and tiles. A letter submitted with the petition indicates that petitioner is involved in the day to day operation of the company.

The director then determined that the petitioner had not sustained its burden of proof.

On appeal, counsel for the petitioner asserts that the petitioner employs the beneficiary as an executive as the beneficiary develops strategic studies and develops feasibility analysis. Counsel notes that this is an essential duty for the petitioner's financial stability. Counsel also asserts that the beneficiary meets the definition of manager as the beneficiary supervises nine individuals. Counsel further asserts that the letter provided by the petitioner offering the beneficiary the position of president clearly describes the beneficiary's duties.

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 "managing working capital," and "make[ing] financial forecasts," and "manage[ing] sales promotions and merchandising." The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. The Service is not compelled to deem the beneficiary to be a manager or an executive simply because the beneficiary possesses a managerial or executive title.

The job duties described by the petitioner do not convey an understanding of what the beneficiary will be doing on a daily basis. In response to the director's request for evidence, the petitioner did not elaborate upon the duties of the beneficiary but merely re-stated the vague and general description submitted with the petition. In addition, the petitioner did not submit supporting documentary evidence that the petitioner employed anyone other than the beneficiary. 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 petitioner did not submit evidence that it had paid independent contractors, nor can such evidence be found upon review of the petitioner's IRS Form 1120. The IRS Form 1120 does not reveal that salaries or commissions have been paid to anyone other than the beneficiary. Contrary to the statement of the director, the evidence submitted by the petitioner reflects only that the petitioner employs the beneficiary. Counsel's assertions that the beneficiary is employed as a manager and an executive are without merit. 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).

In addition, counsel's submission of a projected organizational chart and assertion that the petitioner plans to hire individuals is not persuasive. The 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).

Beyond the decision of the director, we note several inconsistencies found in the record. The petitioner stated its gross revenue for the year 1999 as \$427,000, yet its 1999 IRS Form 1120 shows only \$34,478 in gross receipts. In addition, the petitioner's IRS Forms 941 reflect only one employee, yet information provided to Dun & Bradstreet indicates the petitioner employees three individuals. Further, the petitioner states that it is a wholly-owned subsidiary of a company established in Colombia. Yet the petitioner's IRS Form 1120 Schedule K for both 1999 and 2000 reflect that the petitioner is not a subsidiary in an affiliated group and further that no foreign entity owns more than a 25 percent interest in the company. These inconsistencies go directly to the issues of qualifying relationship and ability to pay. 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).

Further, the petitioner has not submitted sufficient documentary evidence of its ability to pay the proffered salary to the beneficiary. The petitioner has not paid the beneficiary a salary of \$40,000 for either the year 1999 or 2000. The petitioner's 1999 and 2000 IRS Forms 1120 do not reveal that the petitioner had net income that was at least equal to the proffered wage. Further, the petitioner's IRS Form 1120 does not reflect that the petitioner has sufficient net current assets to pay the proffered wage.

Finally, on the issue of qualifying relationship, the petitioner has not submitted sufficient evidence that the petitioner is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas. As noted above, the record contains inconsistent information on this issue and the petitioner has not provided stock certificates, stock registries, and other evidence to support the conclusion that the beneficiary was and will be employed by affiliated companies.

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

In visa petition proceedings, 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, that burden has not been met.



**ORDER:** The appeal is dismissed.