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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy.

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

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: 04 SEP 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, 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 production and wholesale and retail of gourmet popcorn. 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 determined that the petitioner had not demonstrated that the beneficiary's foreign position was primarily managerial or executive in nature or that the beneficiary's United States position would be primarily managerial or executive in nature.

On appeal, counsel for the petitioner contends that the director's decision that the beneficiary's foreign position was not managerial or executive in nature is wrong on the facts and under the law. Counsel further contends that the director's decision that the beneficiary's United States position is not managerial or executive in nature is incorrect.

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.

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.

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:
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> > (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 first issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity with the petitioner.

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-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner was incorporated in the State of Florida in May of 1996. The petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the tax year beginning July 1, 1998 and ending June 30, 1999 reflected gross receipts of $148,590, net income of $24,682.68, no compensation paid to officers and salaries paid in the amount of $57,734. The petitioner states that it employs eight individuals and desires to employ the beneficiary in the capacity of president at an annual salary of $35,000. The petitioner provided a description of the beneficiary's proposed job duties as follows:

> [the beneficiary] will be responsible for the overall direction and development of the company and will supervise, hire and fire employees. . . . [The beneficiary] will exercise wide latitude in

> discretionary decision-making, receiving only general supervision and direction from the Board of Directors. One hundred percent of his time will be allotted to executive duties.

The director requested additional details regarding the beneficiary's proposed position for the United States company.

In response, the petitioner provided the following description:

> The beneficiary['s] . . . daily routine as proposed U.S. position of president will involve the overall direction and development of the company, hiring, firing and supervising of employees, establishing policies concerning finance, advertising, inventory, product line offerings and negotiating customer and supplier contracts. [The beneficiary] will negotiate new contracts on behalf of [the petitioner] to provide company products to Kennedy Space Center and other major businesses in the Orlando area. He will also be developing popcorn related snacks and cookies and negotiating with airlines at Orlando International Airport to supply travelers snacks. He will advise and liase with [the new general manager] on the future development of a new construction division of the business. He will exercise wide latitude in discretionary decision making, receiving only general supervision and direction from the Board of Directors. One hundred percent of his time will be allocated to executive duties.

The petitioner also provided brief position descriptions of its eight employees. The petitioner further provided an organizational chart identifying the beneficiary as the owner, another individual as its current president and several popcorn and cotton candy makers, delivery drivers and a sealer.

The director determined that the beneficiary would be performing a large portion of duties necessary for the business to function. The director also determined that the record did not demonstrate that the United States position involved managing professionals or other managers.

On appeal, counsel for the petitioner asserts that the beneficiary will be taking over the position of an individual who has managed the company for several years. In addition, counsel states that the beneficiary is being transferred to the petitioner so that the petitioner can open up a new line of business in the construction industry. Counsel then asserts that:

> this case is no different than the administrative appeals decision that a small trading company with a Managing Director, Office Manager, Vice President,

> Purchase Manager, Purchasing Representative and several Contractors or Sub Contractors engaged in a day to day task of providing the services of the company are sufficiently complex for L-1 purposes or I-140 purposes.

Counsel finally asserts that the law does not require that companies have hundreds or thousands of employees but only that the foreign position of the beneficiary has included managerial or executive responsibilities and duties and that the proposed United States position does the same. Counsel then concludes that the proposed position clearly qualifies under the applicable rules and regulations.

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 refers, in part, to certain elements of the definition of executive and managerial capacity without describing the actual duties of the beneficiary with respect to the daily operations. In the response to the request for evidence, the petitioner again paraphrased certain elements of the definition of executive capacity by stating that the beneficiary was responsible for the overall direction of the company and that he exercised wide latitude in discretionary decision making. The petitioner then added that the beneficiary would "establish policies concerning finance, advertising, inventory," and "advise and liase with [the new general manager] on the future development of a new construction division." These job duties are vague and too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. The Service is unable to determine from these vague statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. Furthermore, contrary to counsel's claim that these duties are clearly executive in nature, "negotiating customer and supplier contracts," and "developing popcorn related snacks and cookies," more aptly describes an individual performing non-managerial tasks. 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).

In addition, counsel's claim that the beneficiary is being transferred so that the petitioner can open a new line of business is not relevant. 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).

Further, counsel's assertion that this case is analogous to

another Administrative Appeals Office decision is 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). Moreover, counsel has not identified the case and if the case is unpublished, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

Finally, counsel's assertion that the petitioner is not required to employ hundreds or thousands of individuals to meet the definition of an executive is correct. However, in the case at hand the record does not demonstrate that the beneficiary will be employed in an executive capacity or that the beneficiary's duties in the proposed position will be primarily executive in nature. The description of the beneficiary's job duties is more indicative of an individual primarily performing the necessary tasks of the petitioner. Further, the record does not sufficiently establish that the beneficiary will be directing the management of the organization or a function of the organization. The Service is not compelled to deem the beneficiary to be a manager or an executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary will be acting in a primarily managerial or executive capacity in the proposed position.

The second issue in this proceeding is whether the beneficiary has been employed in a primarily managerial or executive capacity for the foreign entity.

In the petition, the petitioner referred to the beneficiary's position for the foreign entity as a managing director. The petitioner described the managing director's duties as managing personnel to assure that a suitable product was produced on a timely basis. The director requested further detail regarding the beneficiary's foreign position.

In response, the petitioner stated that the beneficiary's duties included visiting the various sites to discuss and resolve any problems with the foreman manager, consulting with architects, liasing with utilities and professional bodies and with the local authorities and negotiating with land owners, manufacturers and suppliers in the construction of houses. The petitioner added that the beneficiary liased with managers and sub-contractors as well as inspectors to ensure jobs were completed in a timely fashion. The petitioner further added that the beneficiary supervised fifteen employees including the general foreman and foreman and provided brief job descriptions for each of the individuals.

The director determined that the beneficiary was performing many of the daily functions necessary for a construction company to function. The director further determined that the beneficiary was not supervising professionals or managers and was not

managing a function of the company.

On appeal, counsel for the petitioner asserts that the beneficiary has met the definitional requirements of both a manager and an executive in his work for the foreign company. Counsel asserts that the Service misunderstands the job titles used in the United Kingdom when referencing "site agent," "site foreman," and "general foreman." Counsel indicates that these individuals are professionals and have wide discretionary powers regarding the hiring and firing of individuals and subcontractors. Counsel further asserts that the beneficiary does manage and supervise professionals and other managers and that he does not carry out the other functions of the individuals reporting to him. Counsel also asserts that the beneficiary "is responsible for the overall direction and development of the [foreign] company and supervises, hires and fires employees," and "is responsible for overseeing the hiring and firing of independent contractors and other professionals, managers and service providers." Counsel finally asserts that if staffing levels are considered when making a decision, they must be considered in relation to the reasonable needs of the business and its stage of development.

Counsel's assertions are not persuasive. Contrary to counsel's claim that the beneficiary is responsible for the overall direction and development of the company, the description of the beneficiary's job duties states that the beneficiary is responsible for consulting with architects and working with utilities and local authorities as well as negotiating with land owners manufactures and suppliers. Based on these representations, it is apparent that the beneficiary does not oversee or supervise the basic operations, but rather performs the non-managerial tasks of the foreign entity enabling it to continue its construction function. The general foreman or manager appears to be responsible for the actual labor involved in the construction of houses while the beneficiary is responsible for performing the administrative and logistical services necessary to build houses. Upon review, the beneficiary will be performing operational rather than managerial or executive duties. The evidence submitted must demonstrate that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature. The petitioner has not provided sufficient information to establish that the beneficiary was primarily engaged in managerial or executive duties.

Counsel's assertion that the beneficiary manages and supervises professionals and other managers is also not persuasive. The record does not support the claim that the majority of the beneficiary's time is spent on this task. Moreover, the record does not sufficiently substantiate that the foreign company's employees are professionals or managers rather than general laborers.

Counsel's assertion that if staffing levels are considered when making a decision, they must be considered in relation to the reasonable needs of the business and its stage of development is correct. However, the reasonable needs of the foreign company (or the petitiner) are only one factor in evaluating the claimed managerial or executive duties. The petitioner must still establish that the beneficiary was employed and will be employed in a managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

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.