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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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: SEP 12 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:

[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 retail trade. It seeks to employ the beneficiary as its president and general manager. 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 would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Service failed to properly weigh all the evidence that had been submitted.

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 will 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 was incorporated in the State of Texas in January of 1996. The petition was filed in July of 2000. The petitioner claims that the beneficiary owns 100 percent of its outstanding shares. The petitioner operates the "Classic 99 Cent & Plus Store." The petitioner also claims to have acquired approximately 56 percent of another Texas corporation in September of 1999. The subsidiary company operates the "Sam's \$1.00" store.

The petitioner identified the beneficiary as its president and general manager on the petition and indicated that he would be employed at a salary of \$24,000 per year. The beneficiary as the president of the petitioner described his duties as follows:

I will continue to direct the development of these retail enterprises as well as plan and implement future investment opportunities. My primary responsibilities will continue to include policy making for the current enterprises and future enterprises; financial analysis of current and future business trends and opportunities; and identifying other business opportunities. I will continue to be responsible for the overall operation of 'Classic 99 Cent & Plus Store' and 'Sam's \$1.00' including the hiring, firing and training of employees; reviewing and analyzing retail reports; negotiations with merchandise wholesalers; financing; business development, including marketing and advertising; and acquisition of additional retail locations. Combined, 'Classic 99 Cent & Plus Store' and 'Sam's \$1.00' currently employ six clerks, cashiers and managers who work at least 40 hours per week to assist customers and to handle inventory and merchandising. As the business continues to grow, I intend to increase the staff appropriately.

The petitioner also included copies of its 1999 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return. The IRS Form 1120 for 1999 reflected gross receipts in the amount of \$73,821, compensation paid to the beneficiary as its officer in the amount of \$14,500, and salaries paid in the amount of \$8,280. The petitioner also included the 1999 IRS Form 1120 for its partially owned subsidiary, Hasnain, Inc. The 1999 IRS 1120 for Hasnain, Inc reflected gross receipts in the amount of \$147,189, compensation paid to the beneficiary as its officer in the amount of \$6,000, and salaries paid in the amount of \$3,500.

The director requested further details on the staffing and job positions of the petitioner.

In response the petitioner provided a copy of its staffing list

that depicted the beneficiary as owner/general manager with duties of "overall responsibility for both stores, including finances, inventory acquisition, and marketing." The staffing list also included four employees with duties such as stocker, cashier, customer service representative and as the manager of the Irving (Hasnain, Inc.) store.

The petitioner also included five IRS Form W-2, Wage and Tax Statements for the year 2000. The only W-2 issued by the petitioner was issued to an individual other than the beneficiary. The petitioner's partially owned subsidiary issued the four other W-2s including one issued to the beneficiary stating the 2000-year salary at \$26,000.

The petitioner did not submit any expansion or clarification of the beneficiary's job duties in the response to the request for evidence.

The director determined that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that "organizing and planning the functions of a corporation and hiring employees to carry out these functions classifies one as an executive or manager within a company" and that "[the beneficiary] is responsible for these functions within his position with [the petitioner]." Counsel also asserts that "[the beneficiary] is responsible for the operation and policy management of a number of retail establishments within his Murtaza's Enterprises, Inc.," and that "all functions of each store are handled by managers and individual support staff employees such as cashiers and inventory staff . . ." Counsel further asserts that "[the beneficiary] is not directly involved in the day-to-day operations of any of the establishments within Murtaza's Enterprises, Inc." Counsel concludes by asserting that the Service has not weighed all the evidence and that the evidence previously submitted shows that the beneficiary has management and support staff in place at each location to tend to the day-to-day operations of the business.

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). Initially, the petitioner provided a broad job description that vaguely refers, in part, to duties such as directing the development of the retail enterprises, making policy for the current enterprises and future enterprises, and continuing to be responsible for the overall operation of two retail stores. The Service is unable to determine from these general statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

In addition, the evidence of record is more indicative of an individual primarily performing the basic operations of the company. Regarding the actual operations of the petitioning enterprise the initial description of the beneficiary's job duties includes "analyzing retail reports; negotiations with merchandise wholesalers; financing; business development, including marketing and advertising; and acquisition of additional retail locations." It is apparent that the beneficiary is not overseeing or supervising these activities but rather is performing the non-managerial tasks of analyzing reports, buying products, paying for the products and advertising the products for sale. 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). Furthermore, the petitioner did not submit any evidence to establish that the beneficiary has actually conducted the broadly cast description of his duties, such as "identifying other business opportunities" and "analy[zing] current and future business trends and opportunities." 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).

Counsel's assertion on appeal that the beneficiary is not directly involved in the day-to-day operations of his establishments 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).

Most important, neither counsel nor petitioner has made clear how the beneficiary's work for the partially owned subsidiary relates to the petition at hand. Murtaza Enterprise's Inc. is the petitioning company. As noted above, the definition of managerial and executive capacity both relate to assignments within an organization. Organization is defined at Section 101(a)(28) of the Act and states in pertinent part:

An organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

The beneficiary's assignment for the petitioner and accompanying job duties for the petitioner are the job duties that demonstrate whether the beneficiary is a manager or executive. As noted above, the beneficiary's job duties are vague and do not reflect the beneficiary is acting for the petitioner in a managerial or executive capacity as defined by the Act. The expansion of the beneficiary's job duties to that of a partially-owned subsidiary company does not contribute to a finding that the beneficiary is working for the petitioner in a managerial or executive capacity.

The beneficiary cannot work for two separate companies and claim that the duties and responsibilities for those two separate companies when combined will culminate in managerial or executive duties for one of the organizations.

Further, contrary to counsel's assertion that "all functions of each store are handled by managers and individual support staff employees such as cashiers and inventory staff" the record reveals that in 1999 the petitioner employed at most one employee in addition to the beneficiary as an officer of the company. According to the petitioner's IRS Form 1120 for 1999, the petitioner paid the beneficiary \$14,500 in compensation as an officer and salaries were paid in the amount of \$8,280. The record does not contain any supporting documentation to reflect the actual number of employees in 1999. Based on the salaries paid in 1999, it is unlikely the petitioner employed more than one full-time individual other than the beneficiary. The beneficiary's statement that "as the business continues to grow, [he] intend[s] to increase the staff appropriately" does not contribute to a finding that the beneficiary was eligible for this classification at the time of filing. 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). Moreover, the IRS W-2 Forms issued by the petitioner in 2000 reflect that the petitioner continued to employ only one individual and that compensation paid to the beneficiary was paid by the partially-owned subsidiary.

Upon review, 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 are vague and 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 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 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 established its ability to pay the beneficiary the proffered salary. The petitioner has not paid the beneficiary a salary or otherwise compensated the beneficiary in the amount of \$24,000 in the past. The petitioner's 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. For this additional reason the petition may not be approved.

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.