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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.
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Washington, D.C. 20536



File: EAC 00 003 52696

Office: VERMONT SERVICE CENTER

Date: SEP 23 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, Vermont 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 Maryland engaged in marketing industrial valves, gauges, and food. 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 had been or would be employed in a primarily managerial or executive capacity or that the petitioner could support such a position.

On appeal, counsel for the petitioner asserts that the beneficiary has been operating and managing the petitioner since 1997 and that the director's determination is contrary to the facts and evidence of the case.

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 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 indicates that the beneficiary claims to be engaged in managerial duties. As such, this petition is evaluated pursuant to the criteria set out in section 101(a)(44)(A) of the Act. A beneficiary may not rely on partial sections of the two statutory definitions.

The petitioner initially submitted a brief statement that described the beneficiary as a general manager responsible for, "development and expansion of [the petitioner's] corporate activities and investments." The petitioner also provided a brief description of the beneficiary's duties as:

continuing to seek expansion opportunities, using his business experience to identify sound investments and attract customers, handling all management and financial decisions, supervising all employees, agents, contractors & vendors, purchasing equipment/supplies and comply [sic] with all federal, state and local tax,

safety, licensing, laws, rules, regulations and/or ordinances.

The petitioner also provided its Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the quarters ending in March and June of 1999, each showing six employees, including the beneficiary.

The director requested that the petitioner provided additional information to demonstrate the beneficiary had been employed in a managerial or executive position. The director specifically requested evidence of the staffing of the petitioner, including the number of employees, their job titles, and duties. The director also requested a breakdown of the number of hours the beneficiary devoted to each of his job duties on a weekly basis.

In response, the petitioner provided an unsigned brief statement indicating that the petitioner's day-to-day operation was directly under the supervision and control of the beneficiary. The petitioner also noted that the beneficiary had one subordinate supervisor who managed the day-to-day operations of "Raj Bhoj" in New Jersey. The petitioner also indicated that it employed two sales clerks and a specialty cook. The petitioner stated that the beneficiary had "absolute discretion in hiring, firing, negotiating contracts, arranging terms and financing for [the petitioner]." The petitioner also provided IRS Form W-2s for its employees for the years 1998 and 1999. The W-2s indicated that the employees other than the beneficiary were paid \$32,760 for the years 1998 and 1999. The beneficiary was paid \$19,800 in 1998 and \$25,400 in 1999.

The director determined that the record did not show that the subordinate employees held managerial positions and that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who would relieve the beneficiary from performing the services of the corporation. The director concluded that the record was insufficient to show that the beneficiary had been and would be employed in a primarily executive or managerial capacity or that the petitioner could support such a position.

On appeal, counsel for the petitioner asserts the beneficiary has been operating and managing the petitioner since 1997. Counsel also notes that the beneficiary is employed pursuant to an L-1A visa classification and that the beneficiary is expected to perform the same services as well as undertake additional management duties for the petitioner. Counsel also submits a copy of a management agreement signed in September of 1999 between the petitioner as manager and two entities doing business as Dunkin Donut Stores. Counsel further submits affidavits of two shift managers asserting that the beneficiary has supervised the day-to-day operation of two Dunkin Donut Stores.

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 refer, in part, to duties such as "development and expansion of [the petitioner's] corporate activities and investments" and "identify[ing] sound investments and attract[ing] customers, handling all management and financial decisions." Furthermore in response to the director's request for evidence the petitioner stated that the "day-to-day operation of the petitioner was directly under the supervision and control of the beneficiary." The affidavits counsel submits on appeal also use this phrase. Statements of this nature merely paraphrase the statutory definition of "managerial capacity" without describing the actual duties of the beneficiary with respect to the daily operations. 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. 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).

Contrary to counsel's claim that the beneficiary manages the petitioner, the evidence of record indicates that the beneficiary is primarily performing the basic operations of the company. Regarding the actual operations of the petitioner, the description of the beneficiary's job duties states that the beneficiary is responsible for purchasing equipment and supplies and maintaining compliance with all federal, state and local tax, safety, licensing, laws, rules, regulations and/or ordinances. In addition, the petitioner has not provided sufficient evidence that the beneficiary's subordinate employees are supervisory, professional, or managerial employees. The salaries of the employees reflect part-time or minimum wage workers, not employees that are managerial other than in title. 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)(A)(iv) of the Act.

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 will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will manage the organization through the work of others. 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 simply because the beneficiary possesses a managerial title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial capacity.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a two-year old "marketing" company that claimed to have a gross income of \$326,387. The firm employed the beneficiary as general manager, two employees who also appear as the shareholders of the petitioner, an individual designated an operational manager and two sales clerks. The petitioner did not submit adequate documentation to show that it employed subordinate staff members that would perform the actual day-to-day non-managerial operations of the company. A statement to this effect is insufficient when not supported by documentary evidence. 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). Based on the record, it does not appear that the reasonable needs of the petitioner might plausibly be met by the services of the beneficiary as general manager, an operational manager, the two shareholders of the company, and two sales clerks. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel's note that the beneficiary had been approved for L-1A visa classification and that the beneficiary's duties had not changed has no effect on this petition. Previous approvals of nonimmigrant visas do not necessarily mean that new petitions will also be approved. Eligibility must be demonstrated for each petition filed. As established in numerous decisions, 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., Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., supra at 597.

Beyond the decision of the director, the petitioner has provided

inconsistent statements regarding its ownership. In a letter accompanying the petition, counsel for the petitioner indicates that the parent company in Bombay, India owns 60 percent of the petitioner. However, the petitioner has provided IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 1998 and 1999. The IRS Form 1120S indicates that the corporation is owned by two shareholders in 50 percent portions. The Form 1120S also shows that the election to be treated as an S corporation occurred on January 1, 1998. 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). Furthermore, IRS regulations for S corporations do not allow foreign or corporate ownership. Internal Revenue Code § 1361 (a) and (b).

As the appeal is dismissed for the reason stated above, this issue is 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.