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U.S. Department of Justice
Immigration and Naturalization Service

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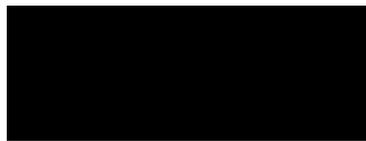


File: WAC 00'114 51584 Office: CALIFORNIA SERVICE CENTER Date: **SEP 23 2002**

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:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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, California 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 California and is engaged in international trade. The petitioner seeks to employ the beneficiary as its president. Accordingly, 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 established that the beneficiary had been or would be employed in an executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the record demonstrates that the beneficiary is employed in a managerial or executive capacity.

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. 8 C.F.R. 204.5(j)(5).

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

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.

It is noted that the petitioner does not clarify 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. The petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions.

The petitioner through its counsel initially described the beneficiary's duties as follows:

She is currently the President of the US affiliate. She has ultimate decision making power over the following essential functions of the company: direct and oversee the company's business, exercise authority over personnel decisions, including the hiring and firing of managers and employees; implement company policies; establish the company's development and expansion plans; exercise discretion over day-to-day operations; execute business transactions and sign contracts; and formulate appropriate courses of action.

Due to the nature of the business, [the beneficiary] will be a functional manager of the highest order within the petitioner's company hierarchy, and that the majority of her duties relate to operational and policy management and to lower level execution of the policies.

The petitioner also provided Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements for the year 1999. The petitioner issued W-2s to seven individuals, including one to the beneficiary in the amount of \$20,400. The salaries to the remaining six employees totaled \$41,544.

In response to a general request for evidence by the director, the petitioner again through its counsel repeated the beneficiary's job description as stated above.

The director determined that the petitioner's job description of the beneficiary's duties was not sufficient to warrant a finding that the beneficiary was employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts the beneficiary manages three professional, managerial or supervisory personnel, namely a vice president, a general manager, and an accountant. Counsel provides an organizational chart and brief job descriptions for the petitioner's employees. It is not clear who set out the descriptions of the various positions held by the

petitioner's employees. However, the description for the beneficiary's job duties is the same as previously submitted. The vice-president's position is described as follows:

Assist the President to manage the U.S. company; determine whether decisions made by subordinates are optimal; establish goals according to market trends and business environment; liaise and cooperate with government agencies; control the budget; report all business plans and activities to President; and hire, fire, and transfer employees.

The general manager's position is described as follows:

Establish criteria for maximizing effectiveness of the office; oversee the company's sales and marketing activities; locate business opportunities and prospective customers; and make decisions over the company's sales operations.

The accountant's position is described as follows:

Responsible for all financial matters and decisions; study cost information and analyze financial statements; prepare and maintain periodic financial reports.

The sales representative positions are described as follows:

Sell company's products; contact and advise customers on their orders and shipments; prepare sales contracts and documents; control and maintain sales records.

The receptionist duties are described as answering the telephone, routine filing, typing, and clerical duties. Counsel also provides two IRS Forms 1099, Miscellaneous Income for the year 2000 and states that the petitioner also employed two independent contractors. The contractor's duties are not revealed. Counsel asserts that the record establishes that the beneficiary is employed in a primarily managerial or executive capacity.

Counsel's assertions are not persuasive. As noted above, the petitioner has never clarified whether it is claiming that the beneficiary meets the statutory definition of executive or of manager or is claiming that the beneficiary is both a manager and an executive under the definitions. 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). The petitioner through its counsel submitted a broad position description that vaguely refers, in part, to duties such as "direct and oversee the company's business," "establish the company's development and expansion plans," and "formulate appropriate courses of action." In addition, the

position description states that the beneficiary is responsible for "exercise[ing] discretion over day-to-day operations," and "exercise[ing] authority over personnel decisions." These statements merely paraphrase portions of the statutory definitions of "executive capacity" and "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. Further, the position description states that the beneficiary will "implement company policies," and "execute business transactions and sign contracts." These duties are more indicative of an individual performing operational duties of the petitioner rather than acting in a managerial or executive capacity. 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).

Counsel's assertion that the beneficiary is "acting as a functional manager of the highest order" is not supported by 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, 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel does not describe this function and the record is insufficient to demonstrate that the beneficiary is doing anything other than serving the petitioner in an operational capacity.

Counsel's assertion that the beneficiary is acting in a managerial or executive capacity because she manages professional, managerial, or supervisory personnel is also 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). Counsel for the first time on appeal identifies various positions within the petitioner's organization and provides job descriptions. The director did not have benefit of the purported organizational structure of the petitioner. Even if the position descriptions are considered, the descriptions for the petitioner's employees are not sufficiently detailed to demonstrate that these employees are professionals, managers, or supervisors. For example, the petitioner has not provided supporting documentation that the purported accountant was a certified accountant with a four-year degree and the required state licensing. Likewise, the petitioner did not sufficiently detail the reporting structure of the petitioner's employees. Based on a review of the petitioner's tax information and the reported salaries, the beneficiary's subordinate employees appear to be part-time. It is not possible to determine from the record that the petitioner employs full-time managers or supervisors that relieve her from primarily performing non-qualifying duties.

The record contains insufficient evidence to demonstrate 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. In addition, a portion of the position description serves to merely paraphrase the statutory definition of managerial or executive capacity. The description of the duties to be performed by the beneficiary does not demonstrate 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 will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her 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 will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has provided only a brief description of the beneficiary's duties for the parent company abroad. This description also lacks detail and is more indicative of an individual performing basic functions for the parent company. The petitioner does not substantiate the managerial or executive nature of the overseas position.

Also beyond the decision of the director, the petitioner has not provided sufficient evidence of its ability to pay the beneficiary the proffered salary of \$42,800 per year. The record is lacking in independent, objective evidence demonstrating that the petitioner has sufficient monies to pay the proffered wage.

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

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.