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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

[Redacted]

File: EAC 00 142 51850 Office: VERMONT SERVICE CENTER Date: SEP 20 2007

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, 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 engaged in international placement services. It seeks to employ the beneficiary as its chief executive officer. 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 petitioner has demonstrated that the beneficiary qualifies as an executive and cites unpublished decisions in support of his assertion.

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.

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 the State of Delaware in January of 1998. The petition was filed in April of 2000. The petitioner also claims to own all outstanding shares of a subsidiary company that was organized in July of 1999.

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 identified the beneficiary as its executive officer in the petition and stated that her salary would be \$52,000 per year. The petitioner also stated that the beneficiary was "involved with the management, business promotion and the daily operation of the company." The petitioner further stated that the beneficiary "sets all corporate policies, and develops strategies for purchasing and marketing."

The petitioner also provided a copy of an undated business plan

that specified the beneficiary required an "extension of [the beneficiary's] L-1 permit as she performs the vital work of applying for the H2A permits on behalf of the US harvesters." The business plan also included the statement that "this vital recruiting and legal work is all performed by [the petitioner] for the US Custom harvesters," and "[the beneficiary] is critically needed for this specialized work."

The petitioner also included copies of its 1998 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return. The IRS Form 1120 for 1998 reflected gross receipts in the amount of \$10,214 and that no compensation had been paid to officers or salaries paid to employees.

The director requested further information on the petitioner's employees and the chain of command at the petitioner's office in Virginia.

In the petitioner's October 2000 response, the petitioner provided the same statement regarding the beneficiary's activities that had been previously submitted. The petitioner also provided an organizational chart depicting the beneficiary as chief executive officer and manager, a manager in training who was "presently [the] admin clerk," an administrative clerk, and a manager of international trade. The organizational chart also noted the use of a bookkeeping service and legal services on a contract basis.

The petitioner also provided the first page of its 1999 IRS Form 1120 revealing [REDACTED] in gross receipts and [REDACTED] paid in salaries. The IRS Form 1120 did not show any compensation paid to officers. The petitioner also included the beneficiary's IRS Form 1040, U.S. Individual Income Tax Return for 1999. The IRS 1040 reflected the beneficiary's salary as [REDACTED]. The petitioner also provided a profit and loss statement for the first six months of the year 2000. The statement revealed total income of \$133,719, professional fees paid in the amount of [REDACTED], payment to subcontractors in the amount of [REDACTED] and wages in the amount of [REDACTED].

The director determined that the record showed that the beneficiary was the only employee of the petitioner. The director concluded that the beneficiary was an operational employee and thus the petitioner had not established that the beneficiary would be employed in an executive or managerial capacity.

Counsel for the petitioner submitted a motion and additional documentation to the director and requested that the director reconsider his decision. The documentation included a letter signed by the beneficiary dated February 16, 2001 stating that she had:

decided it best to contract out almost all of the administrative work . . . [and] therefore signed

contracts with:

1. MA "I" - a [sic] accredited bookkeeping company to handle the daily, monthly, quarterly and yearly bookkeeping of the company.
2. JEF International based in Kansas City to handle the 375 international placements on behalf of [the petitioner].

The petitioner also stated that its wholly-owned subsidiary had hired two workers beginning to work in January of 2001 to handle the administrative work previously performed by [REDACTED] based in Troy, Kansas." The names of the two workers hired in January of 2001 were the same names of individuals reflected on the petitioner's October 2000 organizational chart as its "manager in training" and "administrative clerk."

The beneficiary also provided examples of "policy decisions" she made including setting prices, what services to offer clients, which clients to accept, where to advertise, and who to hire and fire.

The petitioner also submitted a 2001 IRS Form 1099, Miscellaneous Income Report depicting payment made to [REDACTED] in the amount of \$35,887.50. The petitioner also submitted copies of 26 checks issued by it and made payable to [REDACTED] all dated in the year 2000 and totaling \$35,887.50.

The director granted the request to reconsider his decision and reviewed the submitted materials. The director determined that after a complete review of the record of proceeding, including the petitioner's motion, that the grounds of the denial had not been overcome.

On appeal, counsel for the petitioner asserts that the director erred in finding that the beneficiary would not be employed in a managerial capacity. Counsel also asserts that the director misapplied the law in determining that the petitioner did not have employees or evidence that it used contract workers. Counsel further asserts that the petitioner has shown that the beneficiary qualifies as an executive officer. Counsel finally cites unpublished decisions in support of his assertions.

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 "business promotion and the daily operation of the company," and "set[ting] all corporate policies, and develop[ing] strategies for purchasing and marketing." These statements allude to elements contained in the statutory definition of both

executive and managerial capacity and do not convey an understanding of the beneficiary's actual daily duties. In addition, the Service is unable to determine from these statements whether the beneficiary will be performing managerial or executive duties with respect to these activities or whether the beneficiary will actually be performing the activities. The business plan submitted by the petitioner does enlighten the Service somewhat as to the beneficiary's actual duties by stating that the beneficiary is performing all the "vital recruiting and legal work" for US Custom harvesters. This statement more clearly demonstrates that the beneficiary's duties are those of an individual performing services for the company. However, 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). The beneficiary's examples of policy decisions submitted in the motion to reconsider also are more indicative of an individual actually performing the non-managerial tasks necessary to operate a business.

Counsel's assertion that the petitioner employed contract workers and employees in addition to the beneficiary is also not persuasive. The petitioner has submitted inconsistent information on this issue. The petitioner initially provided no evidence of employees other than the beneficiary. In response to the director's request for further evidence the petitioner submitted its organizational chart depicting the beneficiary, two administrative clerks (one a manager in training), an international manager, and the use of a bookkeeping firm and a legal firm. However, the petitioner did not offer independent, objective evidence to substantiate the employment of these individuals in the year 2000. The only information submitted that reveals the payment of salaries and payment to contractors in the year 2000 is an unaudited profit and loss statement for the first six months of that year. This statement indicates that the petitioner paid salaries of \$9,563.35 and made payments to professional firms and subcontractors of \$3,439.62. This information is not sufficient to support the employment structure depicted on the organizational chart submitted in October of 2000.

In addition, the petitioner's statement submitted in support of its motion to reconsider casts doubt on the reliability of the organizational chart. The petitioner states that its administrative work has been performed by an outside business "JEF International" not administrative employees. This statement directly contradicts the organizational structure submitted in October of 2000. Furthermore, the petitioner noted its use of bookkeeping and legal services on the organizational chart but failed to mention "JEF International." It is not possible to conclude this failure was a mere oversight if the petitioner's statement that it was paying this firm over \$35,000 for work performed is considered credible.

Further, the petitioner has submitted inconsistent information regarding "JEF International" and the alleged payment to "JEF International." The checks issued to [REDACTED] by the petitioner are issued in 2000 but the IRS 1099 Form issued to [REDACTED] is for miscellaneous income paid in 2001. [REDACTED] is referred to as based in Kansas City and also a company based in Troy, Kansas. The petitioner's own profit and loss statement for the first six months of 2000 shows only \$3,439.62 paid to outside services and only \$850 paid to subcontractors despite the purported 21 checks issued to "JEF International" in the first six months of 2000. The use of an outside contractor to perform the services of the petitioner has not been substantiated and is in considerable doubt. 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).

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 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 has been employed in either a primarily managerial or executive capacity.

Counsel's citation to various unpublished decisions does not support a conclusion that the petitioner employs the beneficiary in a managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the Irish Dairy Board case or to the other unpublished decisions cited. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

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 \$52,000 in the past. The petitioner has not provided independent, objective

evidence that it has had net income that was at least equal to the proffered wage or has sufficient net current assets to pay the proffered wage. See 8 C.F.R 204.5(g)(2).

In addition, the petitioner has not adequately substantiated that the beneficiary's employment for the foreign entity was in a managerial or executive capacity.

For these additional reasons 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.