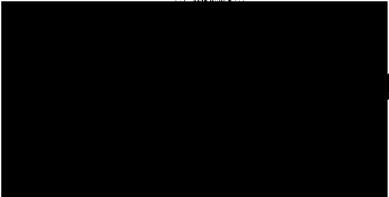


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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prevent clearly unwarranted
invasion of personal privacy

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



File: WAC 00 112 50083 Office: CALIFORNIA SERVICE CENTER

Date: APR 08 2003

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 Bureau 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1995 in the State of California and is claimed to be an affiliate of [REDACTED] located in Venezuela. The petitioner is a retailer of children's clothing. It seeks to employ the beneficiary as an executive of its retail operation. Accordingly, the petitioner endeavors 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 had been and will be employed in a managerial or executive capacity.

On appeal, counsel refutes the director's findings, maintaining that the beneficiary is employed as a valid executive for the petitioning organization.

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

which 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 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.

In the initial filing, the petitioner described the beneficiary's prospective duties as follows: "General supervision of employees, hiring, firing, overseeing the financial aspects of running the company, negotiating with vendors, buyers and sellers." On January 11, 2001 the director instructed the petitioner to submit further evidence to establish that the beneficiary had acted, and would act, in an executive or managerial capacity.

In response, the petitioner provided a job description almost identical to the one submitted with the initial filing. The petitioner added only that overseeing financial aspects of the business would include "reviewing financial results, conferring with accounts about financial planning, wages, withholding, insurance, taxes, paying bills, depositing the receipts, etc." The petitioner indicated that the beneficiary's job title would be that of "store manager."

The petitioner also included brief job descriptions of three sales associates, claiming an annual salary of \$12,000 for one of the associates and \$10,000 for the other two associates. It is noted, however, that even though the petition was filed in March of the year 2000, the petitioner's quarterly wage and withholding report for the March 2000 quarter includes only three employees: the beneficiary and two of his sales associates. In fact, only one of the petitioner's quarterly wage and withholding reports during the year 2000 contained the names of all four employees. The remaining reports showed the names of only three employees, one of whom was always the beneficiary, even though the petitioner claimed, on his petition, to have employed a total of five employees. 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, 591-92 (BIA 1988).

On September 17, 2001 the director denied the petition, concluding that the petitioner failed to establish that the beneficiary's duties have been and would be primarily managerial or executive.

On appeal, counsel asserts that the director erroneously concluded that the beneficiary would assume a managerial role, instead of an executive role, as claimed initially in the petition. In a separate statement, the petitioner submits a brief containing a list of 17 ways in which the beneficiary has discretionary decision-making authority. However, discretionary authority is only one of four elements, all of which must be demonstrated in order to establish that the beneficiary acts in an executive

capacity. The Bureau does not dispute that some of the beneficiary's functions are qualifying. However, the petitioner has not established that the beneficiary *primarily* performs executive duties. Rather, as pointed out by the director, the beneficiary's duties consist of both qualifying tasks, such as controlling personnel matters and making decisions regarding the daily running of the petitioning organization, as well as nonqualifying tasks, such as negotiating with vendors, buyers, and sellers, and other duties typical in the retail business, including "selling, stocking, handling customer complains, to merchandising, in-store advertising"

Although the petitioner disagrees with the director's denial, no evidence has been submitted to establish that the beneficiary's tasks are primarily executive or managerial. Simply 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).

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. Based on the low salaries of the petitioner's sales associates, the beneficiary, at best, is assisted by two to three part-time employees, leaving the beneficiary to handle the remaining needs of the business. Moreover, as previously stated, the record indicates that many of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. 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).

Additionally, the petitioner has not demonstrated that it has reached or will reach a level of organizational complexity in which the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Furthermore, the record does not demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

APR 11 2000
U.S. DEPT. OF JUSTICE
MILWAUKEE, WIS.