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

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ADMINISTRATIVE APPEALS OFFICE
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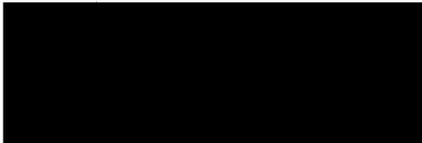
APR 08 2003

File: EAC 01 263 54208 Office: VERMONT SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:



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

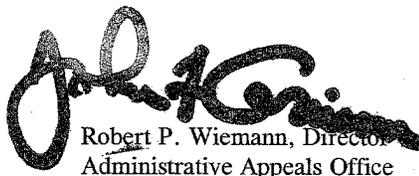
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 of Citizenship and Immigration Services (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 that 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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1990 in the State of New York. The petitioner does not indicate which type of qualifying relationship it claims to have with [REDACTED] located in the Philippines. The petitioner is engaged in the export business. It seeks to employ the beneficiary as its general manager. 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 asserts that the Service erred in its interpretation of the facts and in its application of the law. He submits a brief in support of those assertions.

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 duties and responsibilities in the United States as follows:

1. Responsible for overall operations and financial management for the Corp.
2. Comprehensive knowledge of all functional areas of business operations.
3. Strong initiative in decision making and assumption of responsibilities.
4. Excellent communication and organizational skills.
5. Sources and negotiated purchasing of cost effective, quality equipment & supplies.
6. Acts as check signatory of the Corp.
7. Signatory for all contracts entered into by the Corp. such as lease, shipping, Consolidator.
8. Hired, motivated and evaluated staff in office, sales and delivery.
9. Directed all administrative/operations function.

On October 15, 2001, the director instructed the petitioner to submit a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis for the purpose of establishing that the beneficiary has been and would be employed in a primarily executive or managerial capacity.

In response, the petitioner provided the Service with the following list of the beneficiary's duties and responsibilities:

- Sets long term and day to day corporate strategy.
- Supervises and directs operations of 2 branches (Jersey City, NJ and Makati City, Philippines) and the company headquarters in Queens, NY. Provides strategic direction to branch managers regarding daily operations adherence to business objectives both in the U.S. and in the Phils. via daily teleconferencing, e-mail and fax communications.
- Prepares annual operating budget.
- Serves as principal check signatory for disbursements.
- Serves [sic] as primary planner and decision maker on branch expansion and branch siting [sic].
- Negotiates, enters and signs all contracts with all brokers, contractors, warehouse/office rentals, etc.

- Negotiates with various shipping contractors for all shipment requirements.
- Prepares and implements procedures of controls for finance and sales.
- Oversees purchasing and supplier relations.
- Reviews client needs and implements customer acquisition retention campaigns.
- Provides human resources oversight: interviews, hires and trains employees.
- Design forms, implemented inventory control system and developed mailing method to assure quality customer service.

Although requested to do so, the petitioner failed to provide the Service (now the Bureau) with a breakdown of the number of hours the beneficiary spent performing each of the above-listed duties. It is noted that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Bureau will not consider evidence submitted on appeal for any purpose. Rather, the Bureau will adjudicate the appeal based on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition.

The director denied the petition, concluding that the beneficiary would be primarily involved in performing the day-to-day functions of the business, and that the beneficiary was principally functioning as a staff officer.

On appeal, counsel submits a brief containing a breakdown of the number of hours the beneficiary spent performing each of his duties. However, according to the precedent case law cited above, the newly provided breakdown of hours will not be considered in this proceeding.

Counsel also asserts that the director's consideration of the petitioner's staffing level is contrary to precedent case law and claims that the director failed to take into account that the petitioner does not reasonably need a large staff. To support his claim, counsel cites an unpublished case previously decided by the AAO. However, according to 8 C.F.R. § 103.3(c), only Bureau

precedent decisions are binding on all Bureau employees in the administration of the Act. Furthermore, even though 8 C.F.R. § 204.5(j)(4)(ii) instructs the Bureau to consider the "reasonable needs" of the petitioning entity, such consideration in no way indicates that the Bureau should relax the petitioner's statutorily-imposed burden of establishing that the beneficiary's duties are primarily managerial or executive. To the contrary, the fact that an individual manages a small business does not necessarily establish eligibility for classification as a multinational manager or executive within the meaning of the terms "managerial" or "executive" as defined in section 101(a)(44) of the Act. Eligibility is established by providing evidence that the duties performed by the beneficiary are primarily managerial or executive. Consequently, where the petitioner cannot establish that it has a staff, whether employed by the petitioner directly or on a contract basis, sufficient to relieve the beneficiary from having to perform nonqualifying duties the Bureau is led to believe that the beneficiary is directly involved in providing the petitioner's service or product.

The regulations at 8 C.F.R. § 204.5(j)(5) state that, in examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. In the instant case, the petitioner has indicated that the beneficiary's responsibilities include overseeing purchase and supplier relations, directly making arrangements with shipping contracts, and designing forms to provide quality customer service, and create means for retaining clients. Therefore, aside from supervising the petitioner's branch managers, the beneficiary also actively assists in providing the petitioner's services. This negates the claim that the beneficiary's duties are *primarily* managerial or executive. 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).

Upon review, the description of the beneficiary's job duties lead the Bureau to conclude that the beneficiary is performing as a professional or "staff officer," but not as a manager or executive. The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. 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). Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing his non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because he

possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the record lacks any evidence demonstrating that the petitioner has any type of qualifying relationship with the named foreign entity. Even though the petitioner submitted stock certificates regarding its own ownership, none of the documentation in the record addresses the issue of ownership and control of the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church Scientology International, supra*; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the instant case, there is no indication as to who owns and controls the foreign entity. Therefore, the petitioner failed to submit sufficient evidence to establish the existence of a qualifying relationship. However, as the petition will be dismissed on other grounds, as discussed above, the issue of a qualifying relationship need not be addressed 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

