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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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Washington, DC 20536



APR 18 2003

File: WAC 01 242 54999

Office: CALIFORNIA SERVICE CENTER

Date:

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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

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.

for proper petition
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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in October 1990. It is engaged in the import and sale of frozen avocado and mango products. It seeks to employ the beneficiary as its president. 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 or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director improperly characterized the beneficiary as a first-line manager and that the director's decision was arbitrary, capricious, and an abuse of discretion. Counsel also asserts that the director's decision is based on an incorrect reading of the statute and the effect of staffing levels as interpreted by legislative history and judicial precedents.

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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

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 initially described the beneficiary's job duties as follows:

- Direct and coordinate all major departments, including Sales/Marketing, Accounting, and Distribution
- Supervise all employees
- Hire/terminate employees
- Approve promotions and salary increases
- Negotiate and enter into contracts with key customers
- Authorize and control all money expenditures
- Oversee all cash and short-term investments
- Budgeting
- Cost-volume-profit analysis
- Financial statement analysis
- Represent company before government entities, financial institutions and at trade/industry shows
- Act as liaison between parent company and U.S. subsidiary

The petitioner's letter in support of the petition indicated that the beneficiary "is the current Vice-President, Finance of [the petitioner]." The I-140 petition indicated that the petitioner employed five individuals.

The director requested a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary spent on each of the duties. The director also requested the petitioner's organizational chart and the job titles and job descriptions of all employees under the beneficiary's supervision. The director also requested copies of the petitioner's California Form DE-6, Employers Quarterly Wage Report.

In response, the petitioner stated that the beneficiary was responsible for strategic planning and policymaking and spent 10 percent of her time on this duty. The petitioner also stated that the beneficiary spent 45 percent of her time on business operations management. These duties included coordinating daily operations of all the departments, hiring, terminating, and promoting staff,

supervising an office manager, a sales representative, and an accountant, budgeting, reviewing reports, financial management, and maintaining business communications with the parent company. The petitioner stated that the beneficiary spent the remaining 45 percent of her time on sales and marketing management. These duties included devising and implementing sales and marketing objectives, establishing sales territories and quotas, reviewing sales reports, evaluating sales performance, and contract negotiation with key customers.

The organizational chart depicted the beneficiary as director, an office manager reporting to the beneficiary, and an accountant and sales representative reporting to the office manager. The petitioner also provided brief job descriptions for the three positions subordinate to the beneficiary. The position of office manager involved supervision of support services, analyzing sales reports, tracking pricing, maintaining records and control of product inventory, entry of purchase orders, managing transportation, billing, and invoicing. The position of sales representative involved developing new prospects and interaction with existing customers to increase sales. The position of accountant involved completing and maintaining general ledgers and financial reports, collections, accounts receivable and payable, maintaining a cash flow worksheet, posting wire transfers, preparing commission reports and checks for brokers.

The petitioner also provided its California Form DE-6 for the quarter ending June 30, 2001 showing the number of individuals employed at the time the petition was filed. The California Form DE-6 depicted the employment of six individuals in the first two months of the quarter. The beneficiary and the persons holding the office manager and accounting positions were depicted on the California Form DE-6. The California Form DE-6 also reflected an individual later identified as the president, an individual identified both as the corporate secretary and as an accountant, and an individual later identified as a secretary. The California Form DE-6 depicted another individual whose position was not identified. The sales representative under the supervision of the beneficiary was not reflected on the California Form DE-6 until the following quarter, a few months after the petition was filed.

The director noted that the petitioner had stated that it had five employees on the I-140 petition but had submitted a California Form DE-6 depicting nine employees. Although the director did not specifically request information regarding the job duties of employees not under the beneficiary's supervision, the director noted that the petitioner had not provided job descriptions for these other employees. The director also noted that the petitioner's sales, accounting, and administration departments consisted of one employee in each of those departments. The director determined that the petitioner had not established a reasonable need for an executive because it was merely a sales business and did not need an executive because all they did was buy

and sell products. The director also determined that, because the company only had four employees besides the beneficiary, the beneficiary would necessarily perform numerous menial tasks. The director determined that the petitioner also had not provided sufficient evidence to establish that the beneficiary would supervise employees holding professional positions or to show that the beneficiary was a functional manager.

On appeal, counsel for the petitioner states that the petitioner was in turmoil the previous summer (June 2001) because the "then-president" and its "financial officer" became dissatisfied with changes being made at the petitioner. Counsel provides a copy of the petitioner's current organizational chart and payroll records to demonstrate that the petitioner employs eight persons in addition to the beneficiary. Counsel also states that a position of vice-president has been created which will be filled in June 2002. Counsel states that the vice-president will relieve the beneficiary of many of the tasks she had to perform recently allowing her to devote more time to strategic planning and policy making. Counsel asserts that the director did not support her determination that a small business does not require a manager or executive to run the business. Furthermore, counsel noted that pursuant to the director's interpretation of the law only 0.3 percent of all companies would qualify to file a petition for this visa classification. Counsel asserts that, although the petitioner is a small business, its recent history and the company's resulting reorganization show the beneficiary has been acting in a managerial and executive capacity.

Counsel also provided a declaration signed by the beneficiary. The beneficiary declared that in June 2001 she hired a new office manager. She also stated that the president and the accountant at that time did not like the proposed changes to be made to the company's reporting and computer systems. The beneficiary also declared that in June 2002, due to the destruction of computer records, a police report was filed and the president and accountant tendered their resignations as well as one of the secretaries.¹ The beneficiary further declared "[H]eadquarters assigned [the beneficiary] to be President to replace [the former president]."

The petitioner has not established that, at the time of filing the petition, the beneficiary was or would be engaged in primarily executive or managerial duties. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). At the time of filing the petition, the record shows that the petitioner employed the beneficiary as the vice-president of finance. The petitioner, in the April 30, 2001 petition, however,

¹ Although the beneficiary's declaration indicates this occurred in June 2002, the AAO notes that other information in the record depicts this activity as having occurred in June 2001.

indicated that the beneficiary would be moved into the position of president. The petitioner then must produce sufficient documentary evidence to establish that the beneficiary's proposed position of president is a managerial or executive position, other than in title only, at the time of filing the petition.

The record contains a description of the beneficiary's proposed duties as president and in examining the executive or managerial capacity of the beneficiary the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). However, in the instant case, the description of the beneficiary's duties is general, in that the description does not clearly set out whether the beneficiary's responsibilities are primarily executive or managerial in relation to the duties described or whether the beneficiary will be primarily performing the activities described. 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).

For example, the petitioner indicates that the beneficiary will be supervising, hiring, firing, approving promotions, and approving salary increases of the employees. It appears from the description of these responsibilities that the beneficiary will spend a portion of her time on supervisory duties. However, as determined by the director, although not clearly stated, the petitioner has provided insufficient evidence that the employees she will supervise are professional employees. As stated in the statute, "[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. Contrary to counsel's assertion, the concept of a first-line supervisor is set out in the statute, although the AAO notes that it is, indeed, not defined. Thus, the Bureau must review the evidence in the record using the clear meaning of "first-line supervisor" to determine whether the beneficiary is acting in this capacity or is acting at a higher level in the organizational structure. In this case, the record contains conflicting information regarding the beneficiary's role as a supervisor. The written text regarding the beneficiary's duties seems to indicate that the beneficiary directly supervises all the employees subordinate to her position; however, the organizational chart provided in response to the director's request for further evidence, depicts an intermediate tier between the beneficiary's position as "director" and the "accountant" and sales representative. The organizational chart also provides a notation that the office manager supervises these two individuals.

Of more significance, however, is the beneficiary's declaration on appeal, that the office manager had not been hired at the time the petition was filed but was hired in June 2001, two months after the petition was filed. It is also unclear from the record, if at the time the petition was filed, the beneficiary's proposed

responsibilities as president would include supervising three individuals who resigned sometime in June 2001, namely the president, the corporate secretary/accountant, and a secretary. Although these individuals appear to have been employed at the time of filing the petition, the petitioner does not explain the effect of their duties on the beneficiary's proposed duties nor does the petitioner explain the role of the individual identified as the president once the beneficiary assumed that position. 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). Of further note, the individual identified as the sales representative is not included on the petitioner's California Form DE-6 for the quarter in which the petition was filed. It is impossible to determine from the record the petitioner's number of employees at the time the petition was filed, the employees that would be under the beneficiary's supervision as president, and the role each employee would play once the beneficiary assumed the responsibilities of president.

A further review of the beneficiary's proposed responsibilities indicates that she will spend 45 percent of her time on sales and marketing management. As noted above, the record does not reflect that the petitioner employed the sales representative at the time the petition was filed. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As the record contains no other information establishing that sales personnel were employed at the time the petition was filed, the beneficiary would appear to be the individual performing sales duties. As noted above, an individual 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, supra*.

The description of the beneficiary's additional duties involving control of money expenditures, overseeing cash and short-term investments, budgeting, and reviewing reports, again does not convey an understanding that the beneficiary is performing managerial or executive tasks in regard to these tasks rather than actually performing the tasks. The petitioner's statement that only 10 percent of the beneficiary's time was allocated to strategic planning and policy making, coupled with counsel's statement on appeal that the soon to be hired vice-president would relieve the beneficiary of many tasks, appears to be a recognition

that the beneficiary is the individual primarily involved in performing day-to-day operational tasks for the petitioner.

Counsel's assertion that the director did not support her determination regarding the reasonable needs of the petitioner is persuasive. The director's statement that the petitioner does not need an executive because it is a sales business and all the company does is buy and sell products is subjective. The director should not hold a petitioner to her undefined and unsupported view of "common business practice" or "standard business logic." The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act.

At the time of filing, the petitioner was a ten-year-old importing company. The firm employed the beneficiary as vice-president of finance and was promoting her to the position of president. The petitioner employed several other employees, in the positions of president, accountant/corporate secretary, secretary, as well as another position in the accounting area. The petitioner also employed another individual in an undisclosed role. As explained above, the petitioner's complete staffing picture at the time the petition was filed and the complete staffing picture for the petitioner when the beneficiary assumed the position of president is unclear and not supported by adequate objective evidence. See *Ikea US, Inc. v. INS, supra*. To determine the reasonable needs of a petitioner, the Bureau must have sufficient information regarding the tasks of the petitioner's employees or independent contractors, independent evidence of the individuals actually compensated by the petitioner for performing necessary tasks, consistent evidence demonstrating the roles of the employees or independent contractors, and an understanding of the nature of the petitioner's business. In the case at hand, the information provided for the verifiable staff on hand at the time the petition was filed is not sufficient to allow a conclusion that these individuals could fulfill the reasonable needs of the petitioner, and thus, relieve the beneficiary from performing non-qualifying tasks. The lack of information on this issue, coupled with the general job description provided for the beneficiary does not allow a contrary conclusion. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel's assertion that although the petitioner is a small business, its recent history and the company's resulting reorganization show the beneficiary has been acting in a managerial and executive capacity is not persuasive. 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). Although, the AAO recognizes that the petitioner has undergone organizational and personnel disruptions and was in a state of flux shortly after the petition was filed, the evidence contained in the record is not sufficient to establish that the beneficiary's primary duties had been or would be executive and managerial duties.

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.