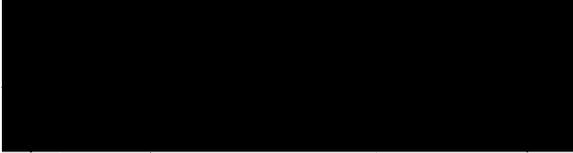


BH

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.  
BCIS, AAO, 20 Mass, 3/F  
Washington, DC 20536



APR 29 2003

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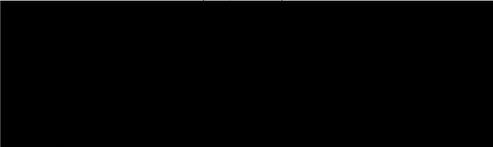
Date:

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.

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

The petitioner is a corporation organized in the State of New Jersey in November 1998. It claims to be engaged in the import and export business as well as commercial investments. It seeks to employ the beneficiary as its president and chief executive officer. 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, the petitioner's representative asserts that the director either misinterpreted or overlooked substantiating facts.

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's claimed parent company submitted a business plan for the petitioner. The business plan stated that during January 1, 2000 and January 2002, the beneficiary implemented certain business activities. The business activities included obtaining operating licenses, complying with taxation procedures, establishing bank accounts, and injecting cash funds towards operations and commercial investments. In addition, the beneficiary negotiated and completed acquisition of a dry cleaning establishment including financing the purchase from a bank. The beneficiary further conducted export and import consulting transactions on a commission basis.

The petitioner also provided its organizational chart depicting the beneficiary as president and chief executive officer, and also indicating that the beneficiary was head of the United States operations, marketing, and administration and was in overall charge of personnel. The organizational chart also included a vice-president and chief operations officer of a professional cleaning facility. The vice-president/chief operations officer's duties included day-to-day operations, personnel, and administration of accounts at the facility. The organizational chart also showed a supervisor for the dry cleaning facility and five sales personnel and shift operators.

The petitioner also submitted documentation of the purchase of a dry cleaning facility by a corporation unrelated to the petitioner. The individual identified on the petitioner's organizational chart as the vice-president/chief operations officer signed all documentation relating to the purchase of the dry cleaning facility as president of this unrelated entity.

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 evidence of the petitioner's staffing including the number of employees, their titles, and the duties performed by each employee.

In response, the petitioner's claimed parent company stated that the beneficiary had been in charge of the operations of the American subsidiary directing and implementing trading activities and commercial investments in the United States. The claimed parent company further stated that the beneficiary was the head of all employees and staff and that he functioned as its chief

executive with full power to make policy decisions and direct all operations of the corporation and the business facility that had been acquired, financed, and operated by the petitioner. The petitioner's claimed parent company further indicated that the beneficiary developed and negotiated contracts to develop new business in the United States and also finalized trading with various India-based manufacturers. The petitioner's claimed parent company summed up the beneficiary's duties by stating that he would engage in meetings to create marketing strategies and procurement policies, put a management team in place, be available for consultation to the staff, and visit business outlets owned and operated by the American subsidiary. The beneficiary on behalf of the petitioner confirmed these duties.

The record also contains a letter of appointment issued to the purported vice-president of the petitioner stating that, as the vice-president was familiar with the dry cleaning facility owned by an unrelated company, the vice-president would be retained on a commission basis by the petitioner. The petitioner also provided copies of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements issued by the unrelated company to employees identified on the petitioner's organizational chart as employees of a dry cleaning facility. The petitioner also provided its IRS Form 1120, U.S. Corporation Income Tax Return for its fiscal year beginning October 1, 2000 and ending September 30, 2001. The IRS Form 1120 revealed wages and salaries paid in the amount of \$24,000 and a net taxable income of \$8,061.

The director noted that the petitioner's payment of \$24,000 in salaries was not sufficient to support subordinate employees in managerial positions. The director determined that the record did not contain a comprehensive description of the beneficiary's duties and did not establish that the beneficiary had been or would be employed in a managerial or executive position.

On appeal, the petitioner's representative states that the \$24,000 paid in salaries was paid only to the beneficiary and was not for compensation of other employees. The representative also states that the beneficiary's executive duties included analyzing the Atlanta market before opening several dry cleaning stores as well as formulating and implementing administrative and operational policies and procedures by controlling the functions of the management. The representative asserts that the business will grow if the beneficiary is given an opportunity.

The information provided on appeal is not persuasive. 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). 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 beneficiary has been responsible for obtaining operating licenses, complying with taxation procedures, and establishing bank accounts. These duties are indicative of an individual starting up a company not managing or directing a company. In addition, the beneficiary apparently is responsible for consulting duties regarding export and import. These duties clearly reflect an individual providing a consulting service rather than directing or managing others who perform the consulting service. Moreover, the petitioner has not provided independent evidence that it employs a staff that requires the beneficiary's management of operations, marketing, or administration of the staff. 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). The petitioner has paid a salary only to the beneficiary and not to any other personnel further demonstrating that the beneficiary does not manage any staff.

The petitioner's reference to the beneficiary's negotiation and acquisition of new business, including a dry cleaning business, is not supported in the record. See *Ikea US, Inc. v. INS*, *supra*. The record contains information regarding the purchase of a dry cleaning business; however, the acquisition was conducted by the alleged vice-president of the petitioner, and was for a company unrelated to the petitioner. The record does not include any documentation showing the transfer of this particular dry cleaning business to the petitioner. The unrelated company, not the petitioner, paid all the employees of the dry cleaning establishment. The only indication that the beneficiary or the petitioner is involved with this dry cleaning business is the petitioner's organizational chart. This chart has little probative value as the record clearly establishes the ownership of the dry cleaning business is an unrelated concern. 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). Furthermore, the petitioner has not provided evidence that the petitioner is conducting import and export activities with overseas entities. Again, going on the 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*, *supra*.

The representative's assertion that the petitioner's business will grow if the beneficiary is given the opportunity is not pertinent and further does 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). The petitioner must establish eligibility at the time of filing the petition; 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). Moreover, as required by 8 C.F.R. § 204.5(j)(3)(i)(D), the petitioner must establish that it has been engaged in doing business for one-year prior to the filing of the petition. The petitioner has not provided evidence that the petitioner has been engaged in the continuous, regular, and systematic provision of goods and/or services by a firm, corporation, or other entity. See 8 C.F.R. § 204.5(j)(2). The mere presence of an agent or office does not meet the one year requirement either. *Id.*

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 duties. The descriptions of the beneficiary's job duties are general and are more indicative of an individual performing consulting services rather than managing or directing the petitioner. 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 him from performing non-qualifying duties. The Bureau 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.

Beyond the decision of the director, and as referred to above, the petitioner has not established that it has been engaged in doing business for one year prior to the filing of the petition. The petitioner's organization and bank statements do not establish that the petitioner is actually providing goods or services to others. For this additional reason, the petition may not be approved. See 8 C.F.R. § 204(j)(3)(i)(D).

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.