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U.S. Department of Justice

Immigration and Naturalization Service

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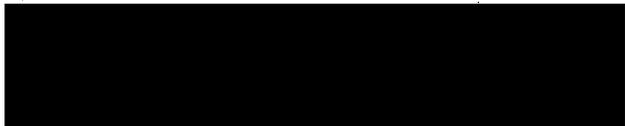
JAN 30 2003

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 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, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The case will be dismissed.

The petitioner is a corporation organized in the State of California in December of 1999. It is engaged in the import, export, and wholesale of antique and decorative goods. 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 would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary directs the company policy and therefore functions as an executive and at a minimum functions at a senior level within the organizational hierarchy.

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 stated the beneficiary's position included the following responsibilities:

General responsibility for the overall operations of the company;

The ultimate authority to decide any financial transactions behalf of the company [sic];

Formulate necessary policies and see they are implemented;

Devise and implement marketing plans and strategies;

Hire and fire personnel as needed;

Coordinate activities between the parent company and its US subsidiary;

Report to the board of directors of . . . the parent company.

The petitioner also submitted an organizational chart depicting the beneficiary as president, a vice-president, a store manager, a wholesale manager, and four sales positions.

The petitioner submitted an additional description of the beneficiary's duties in response to the director's request for further evidence as follows:

Assigns job responsibilities among employees (Time spent: 5%)

Recruits, interviews and trains staff for the company (Time spent: 10%)

Makes financial planning of the company including revenue, expense budgets. (Time spent: 15%)

Approves and controls use of company funds. (Time spent: 10%)

Coordinates work amongst departments, supervising management, and coordinates relationship between partners and parent company in China (Time spent: 35%)

Determines marketing strategies, reviews and approves marketing plans and supervises sales representatives (Time spent: 25%)

The petitioner also provided brief position descriptions for the vice-president/treasurer, the vice-president/C.O.O., and the vice-president/designer. The vice-president/treasurer's position was described as primarily involving bookkeeping, payroll, supervising development of new products, and handling the tracking and order

status with factories. The vice-president/C.O.O.'s position was described as primarily involving logistics for trade shows, shipping and customs brokerage, controlling sales pricing, approving purchase orders, and purchase and trade show planning. The vice-president/designer's position was described as involving buying trips to China, developing new products with the president, supervising production in China, merchandising, and coordinating with the sales and store managers on sales and marketing.

The petitioner also submitted a revised organizational chart depicting the beneficiary as president, a vice-president/treasurer, a vice-president/designer, a vice-president/C.O.O., a store manager, a sales manager, a warehouse manager, and an office assistant.

The petitioner further submitted its California Form DE-6, Quarterly Wage Report for the pertinent quarter ending December 31, 2001. The DE-6 Form revealed six employees, including the beneficiary, and the employees holding the positions of vice-president/treasurer, vice-president/C.O.O., vice-president/designer, store manager, and office assistant.

The petitioner also submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 2001. The Form 1120 revealed gross receipts in the amount of \$627,495, compensation paid to the president and the vice-president/treasurer in the amount of \$52,800, and salaries paid in the amount of \$19,626.

The director determined that the beneficiary's position was essentially that of a first-line supervisor over non-professional and non-managerial employees. The director also noted the discrepancies in position titles between the two organizational charts submitted as well as the discrepancies in the number of employees between the Form DE-6 and the organizational charts. The director concluded that from the job descriptions provided for the petitioner's employees, it appeared that the employees listed as managers would be engaged in the day-to-day non-supervisory duties that are commonplace in the home furnishings business. The director further concluded that the beneficiary would function as a manager in charge of five to seven non-professional employees.

On appeal, counsel asserts that the beneficiary does not engage in selling the petitioner's products. Counsel also explains that the petitioner has shuffled some of its employees to maximize their potential. Counsel also asserts that the use of the title "manager" is simply to reflect that these individuals are in charge of their specific department. Counsel finally asserts that the beneficiary directs the company policy and direction and therefore functions as an executive and functions at a senior level within the organizational hierarchy.

It is noted that neither counsel nor the petitioner effectively

clarifies whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. It appears that the beneficiary may be claiming to be employed as both a manager and an executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions.

Counsel's assertions are not persuasive. In examining the managerial and executive 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). The initial description of the beneficiary's duties was vague and general in nature essentially paraphrasing elements of the definition of managerial and executive capacity. See section 101(a)(44)(A)(iii) and (iv) and section 101(a)(44)(B)(ii).

The petitioner's response to the director's request for additional details of the beneficiary's duties provides some clarification of the beneficiary's day-to-day duties. However, it appears that the majority of the beneficiary's time is spent coordinating the work of the departments, supervising sales representatives, assigning job responsibilities, and making financial and marketing plans for the company. It is not possible to determine from this job description whether the beneficiary will be primarily performing managerial or executive duties with respect to the tasks described or whether the beneficiary will be actually performing the tasks. 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).

Counsel's assertion that the beneficiary will not engage in selling the petitioner's product does not necessarily mean that the beneficiary will be primarily performing executive or managerial duties. First, 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). Second, based on the description of the beneficiary's job duties, the beneficiary appears to primarily serve as a first-line supervisor to non-professional, non-managerial and non-supervisory employees. At the time of filing the petition, the petitioner employed the beneficiary as president and another individual as vice-president. The petitioner's IRS Form 1120 confirms that the petitioner compensated only two employees, the beneficiary and a vice-president, as officers. The petitioner's California DE-6 Form for the pertinent time period reflects individuals employed as a store manager, a wholesale manager, a salesman, and an office assistant. The individuals employed in non-officer positions

received total compensation of \$19,626. Neither the position descriptions nor the salaries of these four employees indicate that these individuals were engaged as or compensated for positions that are professional or managerial in nature. The description of the vice-president's duties also does not suggest that this individual was employed in a professional position or was acting in a supervisory or managerial position.

In looking at the four essential elements that the beneficiary must meet to be considered a manager, the evidence must demonstrate that the beneficiary, manages the organization, supervises and controls the work of other supervisory, professional, or managerial employees, has the authority to hire and fire or recommend these and other personnel actions, and exercises discretion over the day-to-day operations over which the employee has authority. The managerial definition specifically excludes a first-line supervisor from being considered a "manager" under this definition unless the first-line supervisor supervises professional employees. The position descriptions exclude a finding that the positions are professional positions. Neither counsel nor the petitioner provides evidence that any of the beneficiary's five subordinate employees are managers of other employees or of essential functions as required under the Act. The Service cannot conclude from the record that the beneficiary supervises professional, managerial, or supervisory employees.

Counsel's assertion that the beneficiary directs the company policy and direction and conclusion that the beneficiary functions as an executive is also not persuasive. There is no clear delineation of the time the beneficiary will spend on purported executive duties and the time the beneficiary will spend as a first-line supervisor. Moreover as noted above, it is not clear from the beneficiary's job description that the beneficiary will be primarily engaged in executive duties rather than the performance of the operational activities of the company.

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 adequately describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. 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 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.

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.