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

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



FILE: WAC 01 201 50827 Office: CALIFORNIA SERVICE CENTER Date: **JUL 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)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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, 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 1993 in the State of California and claims to be a subsidiary of Taste of France, located in France. Although the petitioner does not clearly state the purpose of its business, the documentation of record indicates that the petitioner is engaged in the sales of French-style furnishings, textiles, and ceramic products. 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 or would be employed in a managerial or executive capacity. The director also determined that the petitioner failed to establish that it has been doing business within the regulatory definition, or that it has a qualifying relationship with a foreign entity.

On appeal, the petitioner refutes the director's findings and submits additional evidence in support of its claims.

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.

The first 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.

On November 12, 2001 the director instructed the petitioner to submit additional documentation. The request included the foreign entity's and U.S. petitioner's organizational charts identifying the beneficiary's position and his subordinates, as well as detailed descriptions of the beneficiary's job duties both abroad and in the United States. The petitioner was asked to provide brief job descriptions, educational levels, and salaries/wages for all of the beneficiary's subordinates.

In lieu of providing the requested organizational charts, the petitioner provided a statement indicating that the foreign entity consisted of two employees: the beneficiary in the role of manager and the beneficiary's father in the role of assistant

manager. The description of the beneficiary's duties abroad suggests that the foreign entity hired the rest of its workers on a contract basis. The petitioner provided the following description of the beneficiary's duties abroad:

Detection of French firms/subcontractors to manufacture products for the account of [the petitioner]. Reaching an agreement with these firms: supervising and controlling employees working within the export department of these firms (average of 5 to 7 employees). Giving employees assignments for marketing and products selections and directing the manufacturing process for lines of products created for the U.S. market.

Contacts with U.S. firms namely, interested by French products, prices negotiation. One employee was hired on a full-time basis depending on the density of activities. Percentage of time spent would be: managerial and executive capacity working with these firms: 70%[.] Contacts with U.S. firms: 30%.

Similarly, instead of providing a block organizational chart for the U.S. entity, the petitioner provided a written explanation of its hierarchy. It stated that the beneficiary assumes the role of manager and export manager for the parent company. The remaining three employees include the following: an assistant manager whose tasks are mainly of an administrative nature including answering phones, responding to e-mails, and "coordination with firms when [the beneficiary] is traveling"; a secretary who assists with language translation and correspondence; and a hostess/secretary who assists with trade shows and replaces the permanent secretary for correspondence when necessary. The petitioner provided the following description of the beneficiary's duties in the United States:

[He performs] prospective actions on the U.S. market to gain new customers. Coordination with the customers, the suppliers (supervising and controlling employees within their export department) and the parent Company. Managing and directing Staff at all levels, from original order of goods to transportation (freight forwarders) and safe delivery of goods to the customers importing directly the goods from France.

Research of new subcontractors in France and definition of new products for the U.S. customers (according to their own requirements) in cooperation with the parent Company in France.

Supervising and controlling employees for follow-up and coordination of financial operations: invoices, bank money transfers to the suppliers, etc.

The percentage time spent by Mr. Patrick Martel would be: managerial and executive capacity working with French subcontractors: 60%[.]

Rest of activities (working with US customers, US entity and parent Company): 40%[.]

The petitioner did not provide the educational levels of any of its U.S. employees. Consequently, the Bureau cannot affirmatively conclude that the beneficiary manages or supervises a staff of professionals or managers.

The director denied the petition, noting that the petitioner failed to establish that the contractors supervised by the beneficiary were professional employees. Regarding the beneficiary's position in the United States, the director concluded that the employees supervised by the beneficiary are not professional; therefore, the beneficiary can be deemed, at most, a first-line supervisor. The director stated that the petitioner failed to establish, both for the foreign and U.S. entities, that the claimed contract employees are the employees of either entity and that, as a result, even if the contractors could be deemed professional, it cannot be concluded that the beneficiary supervises these employees.

On appeal, the petitioner claims that the beneficiary is a function manager and submits an unpublished decision to support its assertion that independent contractors can be considered company employees. However, 8 C.F.R. § 103.3(c) provides that only Bureau precedent decisions are binding on all Bureau employees in the administration of the Act. There is no similar provision for unpublished decisions. Therefore, the unpublished decision cited by the petitioner is not binding and, consequently, is irrelevant in this case. In addition, the petitioner submitted insufficient evidence to establish that it directly employs its claimed employees. Even though requested to do so, the petitioner did not provide any of its quarterly

wage reports identifying its employees and their quarterly salaries. 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).

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 petitioner indicates that the beneficiary's job duties abroad include soliciting business for the company, which includes contacting U.S. businesses. The petitioner indicated that this task consumes 30% of the beneficiary's time. In light of the significant portion of time spent performing this non-qualifying task, it cannot be concluded that the beneficiary *primarily* performed managerial or executive duties.

Similarly, in regard to the beneficiary's duties in the United States, there is no evidence that the employees supervised are professional or managerial. Rather, the beneficiary appears to be taking on such tasks as conducting research, soliciting new customers, and personally dealing with suppliers regarding customer orders. These duties cannot be deemed managerial or executive. Although the petitioner stresses the fact that the beneficiary has a large degree of discretionary authority in both organizations, this factor alone does not determine whether an individual acts in a primarily managerial or executive capacity, particularly where the beneficiary's duties are not primarily managerial or executive.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. 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 non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary 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.

The second issue in this proceeding is whether the petitioner is doing business. Pursuant to 8 C.F.R. § 204.5(j)(2) "doing business" means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

In the instant case, the director concluded that the petitioner failed to establish that it is doing business within the above regulatory definition. The director's conclusion, however, is erroneous. In response to the prior request for additional evidence, the petitioner submitted a number of invoices and shipping documents contradicting the director's conclusion. Additional sales invoices have been submitted on appeal. Therefore, the director's conclusion on this issue is withdrawn.

The remaining issue in this proceeding is whether the petitioner has a qualifying relationship with a foreign entity. While the petitioner maintains its claim of a qualifying relationship, the evidence of record establishes that the beneficiary is not only the petitioner's sole proprietor but also does business in his own name. A sole proprietorship does not qualify as a legal entity for purposes of filing an immigrant petition for an owner. For purposes of the instant petition, a corporation is a separate legal entity from its stockholders and able to file petitions on their behalf and employ them. *Matter of Tessel*, 17 I&N Dec. 631 (Comm. 1981). However, neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). Accordingly, where a sole proprietorship files a petition for its owner, there is no separate legal entity which can employ the beneficiary and which can continue the business operations in the beneficiary's absence. Therefore, the petitioner has failed to establish that it is an entity that has established a qualifying relationship with a foreign entity.

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.