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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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File: WAC 01 008 50507

Office: CALIFORNIA SERVICE CENTER

Date:

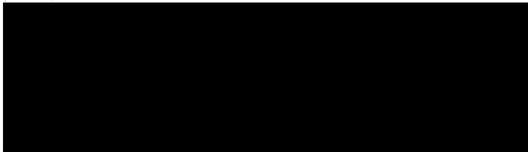
MAR 11 2003

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:



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, 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 September 1998. It claims to be engaged in international trade. 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 executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary plays a managerial and executive role in the company.

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 that the beneficiary had the following responsibilities for the company:

1. Plans, develops, and establishes policies and objectives of business organization in accordance with board directives and corporation charter.
2. Confers with company officials to plan business objective, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives.
3. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions.
4. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.
5. Plans and develops industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, stockholders, and public.
6. Evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives.
7. To study and develop the U.S. and North America market for the parent company's products; to directly report to parent company about U.S. subsidiary's business operating.

The petitioner also submitted a list of its employees including the beneficiary as president, a vice-president, an accountant, a manager, a salesperson, a secretary, two individuals involved in "wholehouse," and two individuals doing miscellaneous work. The petitioner also submitted its California Form DE-6, Employer's Quarterly Wage and Tax Statement for the second quarter of 2000 that depicted the same employees on the employee list except for an individual identified as a "worker" on the employee list.

The director requested the petitioner's organizational chart and a clear identification of all the employees in each department and under the beneficiary's supervision. The director also requested a brief description of the job duties of the employees under the beneficiary's supervision. The director further requested the

petitioner's California Form DE-6 for the last four quarters, which included the California Form DE-6 for the quarter in which the petition was filed.

In response, the petitioner provided an organizational chart depicting the beneficiary as president with a vice-president reporting directly to him. The petitioner also identified three departments under the vice-president. The financial department included one employee, the marketing and sales department included four employees, and the warehouse and freight department included two employees. The petitioner did not describe the employee's duties. The petitioner also provided several California Forms DE-6, including the California Form DE-6 for the quarter ending March 31, 2001, the Form DE-6 closest to the filing of the petition. This California DE-6 Form depicted four employees. The California Form DE-6 for the quarter ending December 31, 2000 that would have included the employees at the time the petition was filed was not provided for the record.

The director determined that the beneficiary could not be classified as an executive because the petitioner's type of business did not reasonably require an executive and that the petitioner did not have sufficient employees to relieve the beneficiary from performing non-qualifying duties. The director also determined that the beneficiary could not be classified as a manager because the beneficiary's position was a first-line supervisory position over non-professional employees. The director further determined that the beneficiary was not a functional manager as the petitioner had not demonstrated that the beneficiary primarily directed or managed a function rather than performing the function.

On appeal, counsel asserts that the beneficiary directs the management of the company because he directs the whole company including the sales department, the warehouse department, and the financial department. Counsel asserts that the beneficiary is involved in policy-making relating to the goals of the company, its development, and its marketing strategy and tactics. Counsel also asserts that the beneficiary has the power and authority to exercise wide latitude in discretionary decision-making. Counsel also asserts that the beneficiary only receives general directions and orders from the board of directors and top personnel of the parent company. Counsel further asserts that the beneficiary manages the whole company, including managing three departments all of which are essential functions of the company. Counsel further asserts that the beneficiary has the power and authority to hire and fire employees and is involved in the day-to-day supervising of the managers of the company's three departments. Counsel finally asserts that the beneficiary is the petitioner's largest investor and is the only representative of the parent company in the United States. Counsel contends that the beneficiary is not a first-line supervisor and that the petitioner has a reasonable need for an executive. Counsel concludes by

stating that the beneficiary's position has significant authority over the petitioner's generalized policy and that his duties are substantially all managerial or executive in nature.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's job description. See 8 C.F.R. § 204.5(j)(5). The petitioner initially provided a broad position description for the beneficiary's duties focussing primarily on the beneficiary's planning, reviewing, and revising company policies and objectives. The petitioner's job description did not include specific information regarding the beneficiary's daily activities. The petitioner did not provide job descriptions for any of its other employees. The petitioner only provided titles of the several employees and identified three separate departments. It is not possible to conclude from the record that the beneficiary was primarily involved in establishing policies and objectives and not primarily involved in implementing the policies and objectives himself rather than implementing policies through the work of others. 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).

The petitioner did not provide supporting independent data of the employment of its personnel at the time the petition was filed and whether these individuals were employed on a part-time or full-time basis. The AAO notes that the California Form DE-6 for the quarter ending June 30, 2000 reflected nine employees and the California Form DE-6 for the quarter ending March 31, 2001 reflected only four employees. The record does not contain an explanation for the loss of a significant number of employees and how this loss affected the beneficiary's daily duties.

Counsel's assertions on appeal that the beneficiary satisfies all the elements contained in the definition of executive and managerial capacity are unpersuasive. 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). 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 sum, the petitioner has not provided a comprehensive description of the beneficiary's job duties. The petitioner has not provided independent evidence of the employment of a sufficient number of employees with their job duties described to support a conclusion that the beneficiary is relieved of performing non-qualifying duties and can focus primarily on executive or managerial tasks. The record as it stands contains insufficient information to demonstrate that the beneficiary has

been employed in a primarily managerial or executive capacity or that the beneficiary's duties will be primarily managerial or executive in nature. The petitioner has not provided sufficient evidence to conclude that a majority of the beneficiary's actual duties relate to operational or policy management, and not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. The petitioner has not established that the beneficiary had been or will be 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.

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