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

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

identifying data deleted to
prevent clearly unwarranted



File: WAC 01 239 56325 Office: CALIFORNIA SERVICE CENTER Date: MAR 11 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 February 1994. It claims to be engaged in international investment, foreign trade and restaurant management. 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 is an executive because he is the president of the company and is in charge of an essential function of the organization.

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 submitted a description of the beneficiary's duties as follows:

In charge of overall management of the company including effectively coordinate all import/export business activities in a manner which maximizes sales, profits, customer satisfaction and the supervision and development of personnel. Actively develop and maintain team approach in the day-to-day management of the company. Plan, develop and establish policies for the Department in accordance with the management in China. Under the supervision of the Board of Director of Parent Company, exercise wide latitude of discretionary decision making. He utilizes his specialized knowledge and experience in international trading to make the best and most cost-effective decision for the Subsidiary and then report regularly to the Board of Director. Direct the implementation of the import/export business expansion plan and operation policies to facilitate the company's trading issues among departments. Direct the utilization of the financial reports and activities data to determine the strategy and progress of the company's business and designate further business goals and plans. Manage and leverage key channel relationships with local business leaders. Oversee the management strategies and promotion activities proposed by the managerial personnel, and approve the management. Has the authority to recruit, terminate, evaluate and promote the company's managerial employees based on job performance, qualification and contribution. He is responsible for staffing the company and setting directions for each employee; and also oversee the management of salary and bonus structures.

The petitioner also submitted its organizational chart depicting the beneficiary as president, a restaurant manager, a business manager, and an accounting manager to be hired. The chart also depicted a chef, a waiter/cashier, and a waiter all reporting to the restaurant manager. The chart reflected two sales specialists reporting to the business manager and an accountant that would report to the accounting manager once hired. The petitioner also provided brief job descriptions for the filled positions noted on the organizational chart. Counsel asserted in the letter

submitted in support of the petition that the employees under the beneficiary's supervision were professionals.

The director requested that the petitioner provide a more detailed description of the beneficiary's job duties. The director also requested that employment of the petitioner's personnel be substantiated with official pay statements and state tax documents.

The petitioner provided the same job description for the beneficiary's position adding only that the beneficiary also directed the fast food restaurant. Counsel asserted in the letter in response to the director's request for evidence that all the employees under the beneficiary's direct supervision were managerial and professional employees. The petitioner also provided its organizational chart. This chart depicted the beneficiary as president and listed a restaurant manager, an accounting manager, a business manager, a chef, kitchen assistant, a part-time waitress/cashier, an accountant, and one sales specialist. The petitioner further provided its California Form DE-6, Employer's Quarterly Wage Report for the quarter ending December 31, 2001 for ten employees. The ten employees could not all be identified with specific positions as noted on the petitioner's organizational charts. Counsel for the petitioner noted in the letter accompanying the response that the petitioner employed nine individuals at the time of the response to the request for evidence. Counsel indicated that the petitioner employed five office personnel and four fast food restaurant employees.

The director determined that the petitioner had provided general job descriptions for both the beneficiary and the petitioner's other employees. The director also determined that the petitioner had not established that its employees held professional positions. The director concluded that the record did not establish that the majority of the beneficiary's duties would be directing the management of the organization.

On appeal, counsel requests that the AAO review the evidence submitted describing the beneficiary's actual day-to-day job duties. Counsel indicates that the petitioner is not contending that the beneficiary is an executive or manager on the basis of the number of employees he supervises or directs. Counsel contends, rather, that the beneficiary satisfies the definition of executive because he maintains wide latitude in discretionary decision-making. Counsel asserts that the beneficiary directs every aspect of the organization and manages numerous essential functions and that this also qualifies the beneficiary as an executive. Counsel submits the opinion of a management and organizational consultant and cites unpublished decisions in support of his contentions.

Counsel's contentions are not persuasive. Counsel correctly

states that the Bureau should look first to the petitioner's description of the beneficiary's job duties when examining the executive or managerial capacity of the beneficiary. See 8 C.F.R. § 204.5(j)(5). The director in this instance did examine the job descriptions provided and found the descriptions insufficient to establish that the beneficiary's duties were executive or managerial in nature. Although the director did not detail the deficiencies of the description, the director's conclusion is correct.

The petitioner's job description refers, in part, to duties such as "[p]lan, develop and establish policies for the Department [company] in accordance with the management in China," and "exercise wide latitude of discretionary decision making." In the response to the director's request for evidence the petitioner indicated that the beneficiary spent 25 percent of his time on these activities. However, paraphrasing elements of the definition of the "executive capacity" does not convey an understanding of what the beneficiary is actually doing for the benefit of the company. The petitioner also states that the beneficiary "[a]ctively develop [sic] and maintain [sic] team approach in the day-to-day management of the company," and "[m]anage [sic] and leverage key channel relationships with local business leaders." These statements are vague and again do not convey a sense of the actual duties the beneficiary is performing for the company. The petitioner attributed 25 percent of the beneficiary's time to handling these "tasks." The petitioner also indicates that the beneficiary will spend 25 percent of his time on the "overall management of the company including effectively coordinate [sic] all import/export business activities in a manner which maximizes sales, profits, customer satisfaction and the supervision and development of personnel." It is not possible to determine from this statement exactly what duties the beneficiary is performing in relation to the "overall management of the company" and whether the beneficiary is performing executive and managerial duties with respect to the management or is actually 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).

The petitioner's job description for the beneficiary does not provide the Bureau with a comprehensive look at the beneficiary's primary duties. The Bureau, thus, looks at the petitioner's type of business, the number of staff, and other evidence in the record to assist in determining the beneficiary's primary activities. In this case, the petitioner appears to be involved to a limited extent in the business of importing and exporting.¹ The

¹ The petitioner's most recent evidence of trading transactions occurred in December 2000. It is not clear from the record that importing and exporting is the primary business of the

petitioner also owns a small fast food service. As previously noted, counsel indicates that the petitioner is not contending that the beneficiary is an executive or manager based on the number of employees he supervises or directs. The petitioner's description of the beneficiary's job duties seems to confirm that the beneficiary devotes a limited amount of time supervising employees. Counsel, instead, focuses on the beneficiary's discretionary decision-making. However, the petitioner has not provided supporting documentary evidence of the beneficiary's decision-making. 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).

Counsel, for the first time on appeal, asserts that the beneficiary manages essential functions for the petitioner; however, counsel's assertion is not sufficient to establish that the beneficiary manages essential functions. 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). The submission of an opinion provided by a management consultant also does not contribute to the petitioner's claim that the beneficiary performs in an executive capacity. Opinions of consultants who may or may not be familiar with the requirements of immigration law are of little probative value especially in light of the insufficiencies contained in this record. Likewise, counsel's citation to various unpublished decisions are of little probative value. Counsel has not furnished evidence to establish that the facts of the instant petition are in any way analogous to those in the cases cited. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c).

In sum, 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. The descriptions of the beneficiary's job duties are vague and general in nature. 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 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.

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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