

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

BH

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[REDACTED]

File: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date: MAR 12 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:

[REDACTED]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

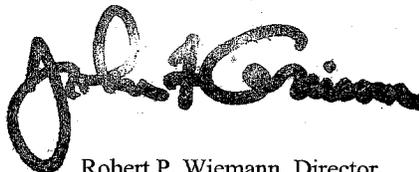
INSTRUCTIONS:

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 Director of the Nebraska Service Center denied the employment-based preference visa and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion. The motion will be granted. The previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a Washington State corporation that seeks to employ the beneficiary as its chief executive officer (CEO). The petitioner, therefore, endeavors to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on the ground that the proffered position was neither executive nor managerial in nature. The AAO affirmed the director's decision, noting that the petitioner had inadequately detailed the beneficiary's job responsibilities and, therefore, there was insufficient evidence to find that the proffered position was in an executive or managerial capacity.

On motion, counsel submits a brief and additional evidence. Counsel states, in part, that there is no evidence in the record to suggest that that beneficiary would be engaged in nonexecutive or nonmanagerial duties as the petitioner's CEO.

Section 203(b) of the Act, *id.* § 1153(b), 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).

Section 101(a)(44)(A) of the Act, *id.* § 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, *id.* § 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 describes itself as a wholly-owned subsidiary of Ocean Sales Ltd. of Canada that distributes household products, primarily by exhibiting them at home trade shows, fairs and exhibitions. The record indicates that the petitioner currently employs the beneficiary in the proffered position of CEO and it is offering the beneficiary the same position on a permanent basis at an annual salary of \$36,000 per year¹.

At the time of filing the petition on March 5, 1999, the petitioner stated that it employed seven to 10 persons and had a gross annual income of \$800,000. In dismissing the appeal, the AAO found that the petitioner failed to provide sufficient evidence of its staffing levels and the beneficiary's daily activities.

On motion, the petitioner submits an affidavit from [REDACTED] the director of Ocean Sales Ltd., and resubmits two separate affidavits from the president, [REDACTED]. Each affiant describes the duties of the proffered position, and the petitioner's staffing levels. [REDACTED] describes the proffered position, in part, as follows:

Retailing at a consumer show is analagous to opening a new retail store. . . .[The beneficiary] is responsible for deciding which consumer shows [the petitioner] will exhibit products at in the United States. . . .[The beneficiary] is responsible for insuring that any applicable direct sellers [sic] licenses, taxation requirements, and health department regulations are met with strict compliance on the day to day level. . . .[The beneficiary] is then responsible for determining which [petitioner] products will be exhibited at each show, and the amount of inventory required at each show. . . .[The beneficiary] is responsible for setting both the retail pricing and wholesale pricing of [the petitioner's] products sold in the United States. . . .[The

¹ The \$36,000 annual salary was listed on the I-140 petition. Counsel states on motion that the beneficiary's salary is approximately \$77,000. As the petitioner's ability to pay the beneficiary's wage is not at issue in this proceeding, the discrepancy between the two salary figures is not material to the issues that shall be discussed.

[REDACTED]

beneficiary] is also responsible for setting up sales calls for sales people to provide training to the sales people at new accounts. . . .

Additionally, the petitioner submits the following evidence on motion:

- Letter of [REDACTED] Ph.D. of Seattle Pacific University, who states that the proffered position is an executive and managerial position.
- Letter from [REDACTED] CPA, who attests that the beneficiary hires staff and directs the petitioner's operations.
- Letter from Key Bank of Washington, which states that the beneficiary is a "signer" on the petitioner's bank account.
- Letter from the owner of the petitioner's office space, who attests that the petitioner leases space at the address listed on the I-140 petition.
- Letter from [REDACTED] Commercial Exhibits Manager for the Western Washington Fair Association, who attests that the beneficiary participated in a task force and that the petitioner is a valued exhibitor at its fair.
- Payroll documentation.
- Information from the petitioner's website.
- Sample show space contracts signed by the beneficiary.
- Sample equipment lease agreements.
- Sample invoices and sales orders.
- The petitioner's income statement for the 2000 calendar year.
- The petitioner's Washington State Quarterly Tax Report for the quarter ending on June 30, 2000.
- The petitioner's State of Washington Combined Excise Tax Return for July 2000.
- The petitioner's 1997 corporate income tax return.

On motion, counsel states that the evidence noted above "clearly and conclusively establishes [the beneficiary] has overall responsibility for the establishment and conduct for [the petitioner.]" According to counsel, the beneficiary markets business to prospective clients, manages the expansion of the petitioner's operations, coordinates financial transactions, controls staff, and acts as the liaison with U.S. Customs for import and export matters. Counsel also states that the beneficiary has been successful in obtaining new clients, and maintains authority over budgets and expenditures. Counsel asserts that, as evidenced by the salary structures and the declaration of the petitioner's director, the general manager and the employees supervised by the general manager are responsible for carrying out the day-to-day business activities of the petitioner's operations.

The sole issue to discuss is whether the proffered position of CEO is in either an executive or managerial capacity. According to an affidavit from the petitioner's director, [REDACTED]

the beneficiary is primarily involved with activities associated with retailing products at consumer shows. These activities include, but are not limited to, deciding what products to exhibit, setting prices, and attending the consumer shows.

It is clear from [redacted] description of the proffered position that the beneficiary primarily provides the services of the organization, as he is ultimately responsible for selling the petitioner's products. 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 (Comm. 1988). Although the beneficiary maintains the authority to hire staff and make decisions on a daily basis, such activities are ancillary to his primary role of ensuring that the petitioner's products are marketed and sold. Activities such as acting as a liaison with U.S. Customs over import and export issues, and marketing products to potential clients are not executive or managerial duties.

Furthermore, the evidence that the petitioner submits on motion, which includes letters from the petitioner's bank, CPA, and a consumer show organizer, as well as copies of invoices, does not demonstrate that the beneficiary primarily works in an executive or managerial capacity. This evidence merely shows that the beneficiary has signatory authority for the petitioner on matters such as finances and sales. The Bureau contends that having signatory authority for a company is not the same as primarily executing the high level responsibilities that are specified in the definition of executive capacity or managerial capacity.

On motion, the petitioner submits a letter from [redacted] Ph.D, a professor of management and information systems at Seattle Pacific University. According to [redacted] the proffered position is both an executive and managerial position because the position entails, in part, the responsibility for providing executive direction and management to the petitioner's business operations and because the beneficiary's responsibilities are more than those of a retail store manager. However, [redacted] assertions are unpersuasive. [redacted] does not identify the documentation that he reviewed to reach his conclusions about the nature of the proffered position. Accordingly, [redacted] statements carry little weight in showing that the proffered position is in an executive or managerial capacity. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

More importantly, however, the petitioner still has not clarified its staffing levels at the time of filing the petition. Staffing levels may be used as a factor in determining whether an individual will be employed in an executive or managerial capacity as long as the Bureau takes into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component,

or function. Section 101(a)(44)(C) of the Act, *id.* § 1101(a)(44)(C).

The Bureau considers the petitioner's staffing levels as they existed at the time of filing the petition. A petitioner must establish eligibility at the time of filing. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The Bureau cannot consider facts that come into being subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I & N Dec. 114 (BIA 1981). At the time of filing the petition, the petitioner claimed to employ seven to 10 persons. However, in dismissing the appeal, the AAO stated that the petitioner had not submitted any evidence concerning the titles or job descriptions of these seven to 10 employees.

On motion, the petitioner and counsel focus on both the petitioner's current staffing levels as well as its staffing levels at the time of filing the petition. Moreover, on motion, the evidence presents several significant inconsistencies. [REDACTED] the director of the overseas entity, states that the petitioner currently employs a permanent staff of six sales members, including one sales manager; however, she does not identify the titles of the four other sales members or describe their job duties. Additionally, [REDACTED] does not explain the petitioner's staffing levels at the time of filing the petition.

Although [REDACTED] states that the petitioner currently employs a permanent staff of six sales members, counsel states in one part of the brief that the petitioner's employees consist of an office manager and "an employee supervised by the Office Manager," and states in another part of the brief that the petitioner has in place a general manager. In another incongruity, [REDACTED] stated in a May 23, 2000 affidavit that the petitioner employed six persons. However, this affidavit, which was executed after the filing of the petition, also did not indicate the petitioner's staffing levels at the time of filing the petition or the job descriptions of the six persons.

The only items of evidence concerning the petitioner's staffing levels at the time of filing the petition are the I-140 petition and a May 12, 1998 affidavit from [REDACTED]. According to the I-140 petition, the petitioner employed seven to 10 persons. Mr. McBride asserts in his affidavit that the petitioner employed one CEO (the beneficiary), one sales manager, one sales executive, and one office clerk, for a total of four employees; he does not provide job descriptions for these employees. Both items of evidence provide inconsistent accounts of the number of the petitioner's employees, and do not supply any information regarding the job duties of the petitioner's employees.

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, 591-92 (BIA 1988). Because a petitioner's staffing levels may be used as a factor in determining whether a beneficiary will work in an executive or managerial capacity, the petitioner has the burden of clearly articulating its staffing levels at the time a petition is filed. Evidence of staffing levels includes, but is not limited to, an organizational chart with the name and job title of each employee, as well as a job description for each employee that identifies the employee's daily activities and overall responsibility. Without this information, the Bureau cannot determine whether the proffered position is in an executive or managerial capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, *id.* § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.