

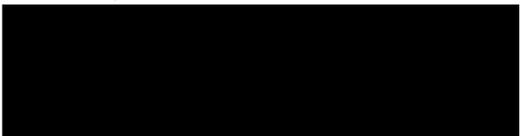
**PUBLIC COPY**

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**B4**

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

ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass. Ave., 3rd Floor  
Washington, D. C. 20536



File: EAC 01 057 50889 Office: VERMONT SERVICE CENTER Date: **MAY 14 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:

**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 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 which 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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was established in 1996, in the state of New York. It claims to be a subsidiary [REDACTED] located in India. The petitioner is engaged in the sale of gold and jewelry. It seeks to employ the beneficiary as its president and chief executive officer (CEO). 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 has been and will be employed in a managerial or executive capacity.

On appeal, counsel asserts that the director's denial is erroneous and was based on an incorrect application of the law. A supporting brief and additional documentation are submitted.

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

which 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 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.

In support of the petition, the following description of the beneficiary's proposed duties was submitted:

[The beneficiary] has been the Manager of our American subsidiary. [The beneficiary's] duties included among other things, importing gold jewelry from India, arranging letters of credit, transferring money, securing insurance, marketing the product, establishing office procedures, adhering to local regulations, insuring quality control, collecting receivables, selecting local retailers to sell our product to, entering agreements with other entities to increase sales, managing and establishing relationships with other entities in America.

[The beneficiary] oversees the importation of our finished product from India. The shipment arrives by air freight from India to New York, New York. There under [The beneficiary's] supervision it is distributed to various American and Canadian Cities for sale to locale [sic] retailers. [The beneficiary] then insures collection of the money due and owing, securing orders, paying American custom fees, . . . exchanging American money to Indian money and sending it back to India, purchasing American products that we need for our business.

The petitioner also submitted a copy of its lease, signed by the beneficiary.

On August 8, 2001 the director sent the petitioner a notice requesting that additional evidence be submitted, including evidence establishing that the beneficiary will be employed in a capacity that is primarily executive or managerial. The petitioner was also asked to submit various tax documents, a breakdown of the beneficiary's duties and the number of hours spent carrying out such duties.

In response, counsel provided, in part, the following statement describing the beneficiary's duties:

Currently four employees are working in [redacted] Office. [The beneficiary] is President [redacted]. As president, he is in charge of marketing our product throughout America in a wholesale manner. [The beneficiary] arranges for the shipment of the product through an independent courier to all parts of the United States, supervises the collection of money from these retailers, negotiates letters of credit with various banks along with exchanging American currency with Indian currencies, interacts with various governmental authorities to ensure a steady stream

of product, supervises the accounting and audit procedures, prepares monthly reports to head quarters. All of these highly skilled functions are clearly executive in nature and require high degree of expertise. . . .

On a weekly basis, [the beneficiary] currently does and will do if our application to employ him permanently is approved, the following: 20 hours to overseeing how the jewelry arrives and distribute the same to various independent contractors with accompanying negotiations as to price, quality with these independent contractors and payment from independent contractors including collections; 10 hours dealing with financial concerns such as maintaining relationships with various banks we employ, the line of credit, supervise the accounting and the monthly reports to the International Headquarters; 5 to 10 hours on securing new business and new independent contractor and met [sic] with mainstream American jewelry stores; 5 to 10 hours dealing with international trade issues such as customs; 5 to 10 hours devoted to management of the New York office and corporation.

The petitioner submitted a list of its employees which includes the beneficiary (as the president), a manager, office manager, and a salesman. The petitioner also submitted four sales representative agreements indicating the hiring of four independent sales representatives who would be paid on a commission basis.

The director denied the petition, concluding that the evidence of record indicates that the beneficiary will be primarily performing non-qualifying duties. The director noted that the petitioner's tax return for the year 2000 maintains that the amount paid in salaries was approximately \$35,000, a figure that is not commensurate with having four full-time employees.

On appeal, counsel submits a brief asserting that the beneficiary fits under the regulatory definitions of both manager and executive. However, in his attempt to establish such eligibility, counsel merely paraphrases the statutory definitions offering only general overviews of how the beneficiary's duties satisfy each prong of "manager" and "executive."

Counsel further claims that the petitioner employs three sales people, and that, as a result of paying them on a commission basis, their salaries are not accounted for in the petitioner's income tax return. While this explains why the income tax return does not include salaries of the commission-based employees, the petitioner claimed, in response to the request for additional evidence, that it also employs a manager and an office manager. Counsel has provided no explanation for why their salaries do not appear to be accounted for in the petitioner's tax returns. Furthermore, although the petitioner has submitted employment agreements to

substantiate its claim that four additional sales people have been hired, mere service contracts are not sufficient to establish that the sales function was and continues to be performed by independent contractors as claimed. The petitioner has submitted no documentary proof that any commissions have been paid to any of its independent contractors. 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). Without sufficient documentary proof that the petitioner employs personnel to perform the sales function, the Bureau cannot assume that the beneficiary himself is free from having to perform such non-qualifying tasks. It is noted that 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).

Finally, counsel asserts that the director considers the petitioner's staffing levels without taking into account the reasonable needs of the organization. However, while the reasonable needs of the petitioning company might be met by the services of one executive, the petitioner must, nevertheless, establish that the beneficiary has been and will be functioning as an executive. Merely because the demands of a small enterprise may be reasonably met by the services of one executive employee, that reasonable need does not absolve the employee to undertake duties of a non-executive nature. Regardless of the reasonable needs of the petitioner, the petitioner must still establish that the alien is to be employed in the United States in a primarily managerial or executive capacity and must clearly describe the duties to be performed by the alien. In the instant case, the descriptions of the beneficiary's duties indicate that the beneficiary has assumed a hands-on roll in a number of the petitioner's day-to-day operations. The tax documents thus far submitted do not support the claim that the petitioner maintains a staff of employees sufficient to relieve the beneficiary of having to engage in receiving shipments, soliciting clientele or analyzing the market and creating marketing strategy, none of which are executive or managerial.

The beneficiary's high level of discretionary authority over every aspect of the petitioning entity is undisputed. The record also clearly establishes that the beneficiary performs a number of essential functions. However, the fact remains that the petitioner has the burden of establishing, with documentary evidence, that the beneficiary's time is primarily spent performing managerial or executive duties. The beneficiary's involvement in operational, day-to-day tasks negates the claim that he primarily acts in a managerial or executive capacity.

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). After careful review of the list of the beneficiary's duties, it is clear that the beneficiary has been and continues to engage in a majority of the petitioner's day-to-day non-qualifying activities. The record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a capacity that is primarily managerial or executive. Accordingly, the petition cannot be approved.

Beyond the decision of the director, the record does not contain sufficient documentation establishing a qualifying relationship between the petitioner and an overseas entity pursuant to 8 C.F.R. § 204.5(j)(3). As previously stated, 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, supra*. However, as the appeal will be dismissed on the grounds discussed above, this issue need not be addressed further.

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.