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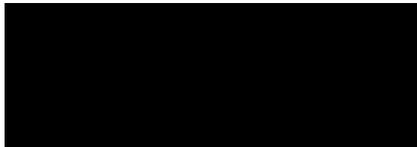
U.S. Department of Homeland Security

Citizenship and Immigration Services

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



FILE:  Office: VERMONT SERVICE CENTER Date: **NOV 17 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:



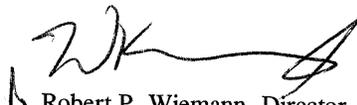
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation and is claimed to be a subsidiary of [REDACTED] located in Canada. 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 record lacks any statements from the petitioner regarding the issue of a qualifying relationship or the nature of the petitioner's business. The director denied the petition based on the conclusion that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel submits a statement refuting the director's conclusion. Additional evidence is submitted in support of the appeal.

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

subsidary 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.

On May 8, 2002, the director instructed the petitioner to submit additional evidence establishing that the beneficiary has been and will be employed in the capacity of executive or manager. The requested evidence included an hourly breakdown of the beneficiary's duties on a weekly basis, evidence of the staffing level of the U.S. petitioner with an indication as to the number of employees it has and their duties. The petitioner was also asked to provide its 2001 tax return as well as the beneficiary's W-2 wage and tax statement for 2001.

The petitioner responded stating that the beneficiary works approximately 45 hours per week, ten of which are devoted to management; 16 of which are devoted to "technical;" 13 hours are

devoted to visiting vendors for negotiating and finalizing contracts; and six hours are devoted to "others." The petitioner also submitted an organizational chart showing a total of three employees, including the beneficiary. The chart indicates that the beneficiary is at the top of the organization's hierarchy with a purchasing and sales manager directly under him, and an office executive at the bottom of that hierarchy. The beneficiary's 2001 tax return and explanation from the foreign entity's chief accountant indicate that although the beneficiary was compensated a total of \$48,000, only \$15,000 of that total came from the petitioning entity. The foreign company paid the remaining \$33,000.

The director ultimately denied the petition, concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary is employed by the petitioner in an executive capacity and offers the following supplemental description of the beneficiary's duties:

- Direct the overall management and operation functions of [the petitioning organization]:
 - The development of the company's marketing strategies for export and distribution
 - Overall supervision of the company's management staff, including the purchasing and the sales department to gain information and coordinate with the surveys conducted by the Purchasing and Sales Mangers
 - Coordinate with the office executive to oversee the overall operations and management transactions of the company.
- Develop various business policies and render effective business for the U.S. venture which comprises of the following:
 - Meet the consumers to negotiate sales contracts proposed by the Sales Manager to determine the

priorities, confer with the cost factors; and determining [sic] the time factor and financial status of the contracts;

- Innovate new marketing strategies in accordance with the recent market conditions
- Coordinate with the Office Executive to administer the overall operations of the company, and preside over the receipt of payments and export consignments to ensure compliance with the U.S. Tax and Custom Laws;
- Direct and allot managerial responsibilities to the Office Executive pertaining to the packing procedures, inspection of packed or grated goods for conformance to shipping specifications
- Implement wide latitude in discretionary decision-making, which includes:
 - Hire individuals in different qualifying positions as per the business criterion;
 - Release non-essential positions;
 - Coordinate with the Sales Manager to finalize sales contracts proposed by them for corporate and individual clients;
 - Create the salary and benefit packages
 - Administer the annual operating budget
- Obtain direction from the Parent Organization pertaining to the overseas Manufacturing, recent product trends, availability of the products, etc. and revise the company's corporate policy to implement the same in the foreign organization

In examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description

of the job duties. See 8 C.F.R. § 204.5(j)(5). The above description of duties indicates that the marketing function is entirely performed by the beneficiary. The description also indicates that even though the petitioner employs a sales manager, the beneficiary is still called upon to meet with the petitioner's customers for the purpose of negotiating contracts. Although both marketing and customer relations are important for the overall progress of the petitioning entity, neither duty can be deemed managerial or executive. It has been well established by precedent case law that an employee who primarily performs the tasks necessary to produce a product or to provide a service is not considered to be employed in a managerial or executive capacity. *Matter of Church of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant case, the beneficiary performs at least two non-qualifying functions.

The breakdown of duties also indicates that the beneficiary directly supervises both of the petitioner's employees. As such, 8 C.F.R. § 204.5(j)(2), which defines managerial capacity, states that the employees managed must be managerial, supervisory, or professional. According to section 101(a)(32) of the Act the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. In the instant case, there is no evidence, despite the position title of the sales manager, that either of the beneficiary's subordinates is a manager or a supervisor, as they do not appear to have any employees to manage or supervise. There is also no evidence to suggest that either employee is professional, as their respective educational levels are unknown. It cannot be concluded, therefore, that the beneficiary supervises employees that are managerial, supervisory, or professional.

Furthermore, counsel stresses the beneficiary's wide latitude in discretionary decision-making. However, the fact remains that the beneficiary has and continues to perform non-qualifying functions, thereby negating the notion that the beneficiary's duties are primarily of a managerial or executive capacity. While counsel asserts that the size of the petitioner's staff "is strictly determined by the nature of their business operations, and the

requirement of staff relating to these operations," the "reasonable needs" of the petitioning entity in no way suggests that CIS should relax the petitioner's statutorily-imposed burden of establishing that the beneficiary's duties are primarily managerial or executive. Furthermore, the record is extremely vague as to the nature of the petitioner's business. It is therefore difficult to determine the "reasonable needs" of the petitioning organization.

Overall, counsel has failed to submit sufficient evidence to support the argument that the beneficiary supervises others as they perform the day-to-day duties of the petitioning organization. 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 fact, the supplemental description of the beneficiary's duties contradicts counsel's assert altogether.

Finally, while the petitioner earlier stated that its employees include [REDACTED] and [REDACTED] the only W-2 wage and tax statements provided on appeal are those of the beneficiary and [REDACTED] an individual who was not named on the petitioner's organizational chart. The petitioner provided no documentary evidence to establish that it actually employs either of the individuals named on its organizational chart. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any 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). In the instant case, counsel provides no explanation, nor does he even acknowledge the discrepancy described above.

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. Nor does the record sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. CIS 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.

Beyond the decision of the director, the record lacks sufficient evidence to determine that the petitioning enterprise has a qualifying relationship with the named foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International* at 595.

In the instant case, the petitioner casually refers to the foreign entity as its parent on appeal. However, the record contains no evidence or even statements addressing the issue of a qualifying relationship.

The record also indicates that the petitioner does not have the ability to pay the beneficiary's proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2), the following is said of the petitioner's burden of establishing the ability to pay:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant case, the petitioner has provided documentation suggesting that the foreign entity, rather than the petitioner, pays the majority of the beneficiary's salary. This contradicts the notion that the petitioner has the ability to compensate the



beneficiary his proffered wage. However, as this appeal will be dismissed on the grounds discussed above, the issues of a qualifying relationship and the petitioner's ability to pay need not be further addressed.

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.