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U.S. Department of Homeland Security
Citizenship and Naturalization 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: EAC 01 118 52583 Office: VERMONT SERVICE CENTER Date:

NOV 21 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



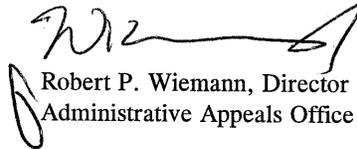
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office 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 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 Director, Vermont Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was established in 1997, in the state of New York. It claims that it is an affiliate of [REDACTED] Inc., located in Canada. The petitioner is engaged in the repair and sales of dental tools and equipment. 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 and will be employed in a managerial or executive capacity.

On appeal, counsel asserts that the director's denial is erroneous and constitutes an abuse of discretion. A supporting brief has been submitted and is accompanied by additional documentation.

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 petitioner submitted the following list of the beneficiary's proposed duties:

- a) Solely responsible for developing and implementing the business plan, including forecasting of sales, review and selection of product lines, budgets and expansions;
- b) Strategic planning for the company's expansion including review and analysis of product pricing and markup, research and development of potential customer base;
- c) Research, developing and implementing marketing and advertising strategies including establishing links with new suppliers and customers;
- d) Traveling to trade shows to keep up with technological changes in the dental industry as well as to search for new items to market;
- e) Develop and oversee company's budgets and accounting functions, including reviewing balance sheets, cost analysis, markup percentages, sales revenues generated and forecasts;
- f) Designing and manufacturing of special tools needed in instrument repair; and
- g) Sales and service of dental instruments and appliances.

The above list was followed by the petitioner's claim that at least 90% of the beneficiary's time is "spent on business planning, sales, marketing and business expansion."

On August 15, 2001, the director sent the petitioner a notice requesting that additional evidence be submitted. Among the requested documentation was a comprehensive description of the beneficiary's duties with an indication of how such duties have been and will be of a managerial or executive capacity. The petitioner was also asked to submit a list of its employees accompanied by a breakdown of their respective duties and the number of hours spent carrying out such duties. The director requested that the hourly breakdown of duties also be provided for the beneficiary. A number of tax documents were also requested.

In response, counsel provided a statement on behalf of the petitioner stating that the beneficiary is the petitioner's sole employee, aside from an independent contractor hired to provide administrative services. The petitioner provided the following

breakdown of the beneficiary's duties:

On average, 28 hours per week are spent directly on implementing and managing the business' sales and marketing plan. This includes:

1. Forecasting of sales;
2. Review and selection of product line;
3. Preparation of annual budget;
4. Strategic planning for company expansion;
5. Review analysis of product pricing and mark-up;
6. Development and implementation of strategies for increasing customer base;
7. Development and implementation of marketing and advertising strategies for new suppliers;
8. Representing company at trade shows to search for new items to market and to keep up with technological changes;
9. Develop and oversee annual accounting functions, including reviewing balance sheets, cost analysis, mark-up percentages, sales revenues generated and sales forecast.

* * *

On average, 18 hours per week are involved in supervision of the company which has been contracted to provide administrative and office support. The company, Y-Z Sales & Marketing has been hired by [REDACTED] Ltd. as an independent contractor to provide office management and accounting services. This includes payment of bills, tracking invoices, responding to correspondence and inquiries, etc.

On average, 18 hours per week spent in the actual repair of dental equipment. . . . The majority of income comes from Mr. [REDACTED] sales and marketing functions.

* * *

Of his executive duties described above, approximately 9 hours per week are expanded [sic] by Mr. [REDACTED] in connection with business expansion plans. The services of the independent contracting company will be replaced by a direct employee in the office. . . . Mr. [REDACTED] will spend approximately 20-25 hours per week in the training of his new employee.

The director denied the petition, concluding that the evidence of record indicates that the beneficiary will be primarily performing non-qualifying duties. The director also noted that the petitioner failed to submit an income tax return for fiscal year 2000. While a 2000 income tax return, indeed, was not included in the record, counsel is correct in pointing out that this particular

documentation was not requested in the director's request for additional evidence. Counsel is also correct in pointing out that there is no clear explanation of where the director obtained the figure of \$31,845 as the figure for the petitioner's net income. However, contrary to counsel's assertion, neither the petitioner's incorrect net income figure nor its perceived "failure" to submit its year 2000 income tax return served as grounds for the denial. The director's inaccurate statements regarding these factors touch on collateral issues, not those issues that are at the heart of the reasons for denial. Rather, the core issue in the instant denial was whether the description of the beneficiary's job duties indicates that the beneficiary has been and will be employed in a capacity that is primarily managerial or executive.

Counsel claims that the beneficiary's duties "do measure up to the standards outlined by the regulations for executive or managerial 'status' consideration." He further states that the size of the petitioning entity does not render the beneficiary ineligible for immigrant classification as a multinational manager or executive. While counsel is accurate in pointing out that denial of a petition should not be entirely based on the number of a petitioning entity's employees, the circumstances of the instant case indicate that lack of personnel causes the beneficiary to have to perform nearly all of the petitioner's daily operational tasks, which are of a non-qualifying nature.

Counsel further points out that the petitioner is engaged in a service-oriented industry. While this may be the case, the fact remains that the beneficiary's status as the petitioner's only employee requires that he be the one to market, sell, and actually provide the company's clients with that service. Regardless of the beneficiary's discretionary authority, or the fact that the beneficiary performs functions that are clearly essential to the petitioner's survival and financial success, the beneficiary's involvement in these day-to-day operational tasks negates the claim that he primarily acts in a managerial or executive capacity. 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 urges the AAO to take note of the petitioner's reasonable needs. 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 primarily functioning as an executive. Although the needs of a small enterprise may be reasonably met by the services of one executive employee, that reasonable need does not absolve the employee to primarily 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. As discussed above, the petitioner has not established that the beneficiary has been and will be employed in a managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, the AAO 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. Although the beneficiary has control over the petitioner's daily activities, it is clear that he is the one who carries out most of the work, regardless of its non-qualifying nature. 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 only evidence on record which indicates that a qualifying relationship may exist between the petitioner and a foreign entity is a written declaration signed by the beneficiary in his capacity as the petitioner's president. The record contains no stock transfer ledger or stock certificates confirming the declaration. 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). Thus, the record does not contain sufficient documentary evidence of a qualifying relationship pursuant to 8 C.F.R. § 204.5(j)(3). 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.