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

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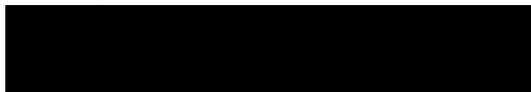
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

OCT 07 2003



File: EAC 02 046 53318 Office: VERMONT SERVICE CENTER Date:

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:



**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 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 employment-based 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 limited liability company organized in June 1995 in the State of New Jersey. It is engaged in the import and export of fishing boats, diesel boat motors, and the import of rattan furniture and teak. It seeks to employ the beneficiary as its director. 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 or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that CIS applied the old and less flexible version of the definition of managerial and executive capacity and failed to apply the concept of functional management.

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 has been and will be performing primarily executive or managerial 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 stated that the beneficiary's assignment was in a managerial/executive capacity because he received a salary commensurate with such a position, was responsible for the day-to-day discretionary control over other professionals, executive and managerial employees, had day-to-day discretionary authority over strategic planning, financial planning and human resources functions, and reported directly to the president/director of the Indonesian parent company.

The petitioner indicated that the beneficiary would continue to perform the following:

1. Evaluating performance of other Executives and Managers within the Lakota organization for compliance with established policies and objectives;
2. Reviewing analyses of activities, costs, operations and forecast data to determine progress;
3. Directing and coordinating activities involved with the importing/exporting of U.S. fishing boats and diesel boat motors in addition to the importing of rattan furniture and teak doors as well as, windows and picture frames;
4. Reviewing market analyses to determine customer needs, volume potential, price schedules, and discount rates;
5. Overseeing and developing sales campaigns to accommodate the goals of [the petitioner];
6. Representing the organization at association meetings to promote [the petitioner's] services; and
7. Directing product research and development.

The director requested a breakdown of the hours devoted to each of the beneficiary's job duties on a weekly basis. The director also requested evidence of the petitioner's staffing including the number of employees, their titles, and duties as well as the

petitioner's management and personnel structure, and documentary evidence of how the employees were paid. The director also requested the petitioner's Internal Revenue Service (IRS) federal tax returns.

In response, the petitioner through its attorney asserted that the beneficiary was both a traditional as well as a "functional" manager responsible for the United States operation. Counsel also stated that the beneficiary spent 30 percent of his time working with the director/president of the foreign entity and the store manager. Counsel stated that the beneficiary spent an additional 30 percent of his time "directing the importing and exporting operation, maintaining contact and negotiating with suppliers, distribution centers, foreign sales distribution centers, and subsidiary counterparts of the Lakota organization, Indonesian manufacturers, and shipment personnel." Counsel stated further that the beneficiary spent 30 percent of his time "improving and creating the overall importing plan of [the petitioner] by providing product research and development." Counsel indicated that the beneficiary spent the remaining 10 percent of his time on non-executive duties.

Counsel indicated that the beneficiary had employed various individuals and was currently employing a store manager. The petitioner submitted three pay stubs to evidence payment of the store manager. The pay stubs are dated January, February, and March 2002. The petitioner also submitted IRS Form 1065, U.S. Return of Partnership Income for 2001. The IRS Form 1065 showed \$45,000 paid in salaries and wages. The beneficiary's IRS Form 1040 for 2001 showed the beneficiary as having received \$45,000 in salary.

The director noted that the \$45,000 paid in salary listed on the petitioner's IRS Form 1065 did not include payment made to individuals subordinate to the beneficiary. The director determined that the petitioner had not established that the beneficiary would be involved in the supervision and control of other supervisory, professional, or managerial employees who would relieve him from performing the services of the corporation. The director also found that re-stating the definitions of managerial and executive capacity was not sufficient to establish the beneficiary's managerial or executive capacity. The director determined that the petitioner had not provided a comprehensive description of the beneficiary's duties. The director concluded that the evidence of the record did not establish that the beneficiary would function as an executive or manage a subordinate staff that would relieve him from performing non-qualifying duties.

The petitioner filed a motion to reopen the proceedings. The director granted the motion but upon review found that the petitioner had not established that the beneficiary directed the management of the organization. The director also determined that the record did not demonstrate that the beneficiary would be

engaged in primarily managerial or executive duties. Instead, the director found the beneficiary would be engaged primarily in the non-managerial day-to-day operations of the company.

On appeal, counsel for the petitioner asserts that the beneficiary is a functional manager responsible for the United States operation. Counsel also asserts that CIS improperly considered the petitioner's staffing levels without addressing the reasonable needs of the petitioner. Counsel further asserts that CIS has already determined that the beneficiary is engaged in managerial and executive duties by approving the beneficiary as an L-1A intracompany transferee.

The petitioner does not clarify whether the beneficiary claims to be engaged solely in managerial duties under section 101(a)(44)(A) of the Act as a functional manager, or solely in executive duties under section 101(a)(44)(B) of the Act. If the petitioner claims that the beneficiary is both a manager and an executive, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the four criteria set forth in the statutory definition for manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel's assertions are not persuasive. When 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 petitioner initially stated that the beneficiary was employed as an executive/manager because his salary was commensurate with such a position. Although the lack of a significant salary may detract from a claim that a person is employed in a managerial or executive capacity, the amount of a salary does not substantiate that an individual is employed in a managerial or executive capacity. The description of an individual's duties is the basis from which CIS will deduce the managerial or executive nature of the duties. The petitioner stated that the beneficiary was responsible for the day-to-day discretionary control over other professional, executive and managerial employees, had day-to-day discretionary authority over strategic planning, financial and human resources functions, and reported directly to the president/director of the Indonesian parent company. The petitioner's statements are broad and borrow liberally from the statutory definitions of managerial and executive capacity. See section 101(a)(44)(A)(ii) and (iv) and section 101(a)(44)(B)(ii) and (iv) of the Act. Consequently, this information does not convey an understanding of the beneficiary's daily duties.

The petitioner also indicated the beneficiary evaluated the performance of other executives and managers. However, the petitioner did not provide independent supporting evidence that the petitioner employed individuals other than the beneficiary when the

petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not provided substantiating evidence that it employed a "store manager" when the petition was filed. 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).

The petitioner indicates the beneficiary reviews market analyses, oversees and develops sales campaigns, and directs product research and development. However, the petitioner provides no evidence that it employs individuals or independent contractors to prepare market analyses, to develop sales campaigns, or to produce market research. CIS must conclude that the beneficiary is responsible for providing these services to the petitioner. 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). Likewise, coordinating the activities involved with importing and exporting is more indicative of an individual involved in the every day operational functions of the petitioner. It is not possible to determine whether the beneficiary's attendance at association meetings is a sales or promotional function, is an effort to establish business contacts and good will, or is primarily an executive duty.

Counsel's response to the director's request for a breakdown of the beneficiary's duties confirms that the beneficiary will be the employee negotiating contracts and providing the market research. The beneficiary is the individual performing these duties.

Counsel's assertion on appeal that the beneficiary is a functional manager is not persuasive. The term "essential function" or even "directing the management of a function" is applicable when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. However, to allow the broad application of the term "essential function" or "directing the management of a function" to include all individuals who head organizations would render the term meaningless. If counsel claims that the beneficiary is managing an essential function or directing the management of a function, the petitioner must identify the function with specificity, articulate the essential nature of the function as well as establish the proportion of the beneficiary's daily duties attributed to managing or directing the essential function. In addition, the petitioner must provide a comprehensive description of the beneficiary's

duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages or directs an essential function.

Counsel's assertion that the director did not consider the reasonable needs of the petitioner when considering the staffing levels of the petitioner is not persuasive. At the time of filing, the petitioner was a six-year-old company that substantiated the employment only of the beneficiary when the petition was filed. The beneficiary's job duties do not substantiate that the beneficiary's assignment for the petitioner was primarily in a managerial or executive capacity. Based on the beneficiary's job description and the lack of other staff, the record shows that the beneficiary is the individual providing the every day operational services for the petitioner. It is not possible to conclude that the staff on hand could meet the petitioner's reasonable needs without the beneficiary's active participation in providing basic operational services for the petitioner.

The petitioner has not supplied evidence to establish that the beneficiary's primary assignment will be managerial or executive. The record is deficient in providing a comprehensive description of the beneficiary's duties and other documentary evidence that the beneficiary's actual daily duties are executive or managerial duties and that such duties are the beneficiary's primary assignment. Counsel cites several cases both published and unpublished. However, counsel has not provided evidence to establish that the facts of the instant petition are analogous to the cited cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

The petitioner noted that CIS had previously approved other L-1 petitions for this beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. The record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of CIS. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The petitioner has not established the executive or managerial nature of the beneficiary's position.

Beyond the decision of the director the petitioner has not established a qualifying relationship with the beneficiary's overseas employer. See 8 C.F.R. § 204.5(j)(2). In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and

foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. See section 203(b)(1)(C) of the Act.

The petitioner states that it is a subsidiary of the overseas entity. However, the petitioner's IRS Form 1065 indicates that the beneficiary owns a 93.75 interest in the limited liability company. The petitioner does not provide evidence of the ownership of the overseas entity. The petitioner has provided conflicting evidence regarding its ownership and control. 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 (BIA 1988). The petitioner has not provided evidence substantiating the qualifying relationship between the petitioner and the beneficiary's overseas employer.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.