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

**B9**

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

[REDACTED]

OCT 16 2003

File: [REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

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]

**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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was approved by the Director, California Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company organized in August 1999 in the State of California. It is engaged in the import and sale of melamine and acrylic products. It seeks to employ the beneficiary as its general manager. 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 initially approved the petition on July 21, 2001. Upon review of the record, the director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the petitioner. After properly issuing a preliminary notice of intent to revoke, the director revoked the approval of the petition on September 27, 2002.

On appeal, counsel asserts the director erred on a legal and factual basis when revoking approval of the petition.

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. See 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive 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 in its letter in support of the petition that the beneficiary's main responsibilities included:

Plan, develop, and establish policies and objectives of the U.S. entity, and report them to the board of directors. Coordinate functions and operations between departments. Establish responsibilities and procedures for attaining objectives. Review activity reports and financial statements to determine progress and status in attaining objectives and revise objective[s] and plan[s] in accordance with current conditions. Plan and develop public relationship policies designed to [sic] in accordance with current conditions. Plan and develop public relationship policies designed to improve company's image and relations with clients, employees, and public. Recruit, train, and evaluate performance of all employees in the Sales, Financial, and Warehouse Department. Confer with Finance Department for funds allocation for potential-profit-driven projects. Direct and coordinate with the Sales Department Manager to promote products and negotiate contracts.

The petitioner also provided its organizational chart showing the beneficiary as general manager and as the "warehouse control" in the warehouse section. The chart also showed an individual employed in the sales and marketing section of the sales and warehouse department and the same individual in the documentation section of the financial department. The chart also included an individual employed in the position of warehouse workman in the warehouse section of the sales and warehouse department and an accountant in the accounting section of the financial department. The organizational chart also referenced a list of contract representatives.

The petitioner also provided an employee list with brief job descriptions. The petitioner stated that the general manager,

the beneficiary's position, would "handle Direct Sales, to [sic] handle Sales representatives' contract." The petitioner also indicated that the customer services person (the person identified as the sales and marketing person in the sales and warehouse department on the organizational chart) would reply to all customers' inquiries. The petitioner further indicated that the warehouse workman would "handle in/out products, to arrange transport to ship in/out products." The petitioner provided its California Form DE-6 for the quarter preceding the filing of the petition. The California Form DE-6 confirmed the employment of the beneficiary, the customer services/sales and marketing/documentation person, and the warehouse workman.

The petitioner also submitted copies of contracts with several sales groups and Internal Revenue Service (IRS) Forms 1099, Miscellaneous Income Statements for the year 2000. The IRS Forms 1099 confirmed payment of miscellaneous income to six different sales groups.

The director in his notice of intent to revoke noted that the petitioner had provided evidence of only three employees, including the beneficiary. The director determined that the beneficiary supervised two employees and that neither of the two positions held by the employees were professional positions. The director also determined that delegating the sales functions to outside groups by establishing prices, commissions and the territories of the sales groups did not constitute "management control" within the meaning of the regulations. The director further determined that the petitioner did not have a reasonable need for an executive because it was an import business with only three employees. The director concluded by proposing to revoke approval of the petition and according the petitioner 30 days to offer evidence in rebuttal to the proposed revocation.

In rebuttal, the petitioner stated that the beneficiary's responsibilities included:

- Solely handles the purchasing and designing of the products and logo
- Develops company goals and targets for future direction
  - o Chooses shows [the petitioner] will display at
  - o Hand picks high volume businesses to target
- Oversees all decisions regarding Sales Team
  - o Hiring and firing
- Manages the first-line supervisor in carrying out all plans and operations

- Manages the warehouse
  - Directs actions regarding manufacturing errors in color, style and packaging
- Communication link between [the overseas entity] and the petitioner
  - Manufacturing
  - Pricing
  - Coordination of customers to avoid overlapping

The petitioner also submitted a revised organizational chart showing the beneficiary as general manager, the former sales/marketing/documentation person as the operations manager and the outside sales teams reporting to the operations manager. The chart also showed the warehouse workman in the shipping and receiving department subordinate to the operations manager. The chart also noted the employment of an accountant. The chart further indicated that four new employees had been or would be hired in 2002. The petitioner provided copies of IRS Forms 1099, Miscellaneous Income Statements for the year 2001 showing payment to six sales groups.

The petitioner, through its counsel, also asserted that the director misinterpreted the statutory requirements when determining the beneficiary was not a manager. Counsel stated that the beneficiary was not supervising professionals but was managing an essential function within the organization. Counsel asserted that, although the beneficiary did not have managerial control over the sales groups used by the petitioner, the beneficiary managed the sales function of the petitioner. Counsel stated that the beneficiary made the decision to delegate the sales function, chose the sales groups to be used, negotiated terms with the sales groups, and supported the sales groups with samples and catalogs.

In addition, counsel asserted that customer service, accounting, shipping and receiving functions were carried out by two of the petitioner's employees and that the sales function was carried out by the sales contractors. Counsel asserted that the petitioner's purchase function was kept at a minimal level.

The director again determined that the beneficiary was a first-line supervisor over non-professional employees. The director also indicated that establishing price controls, commissions, and territories for outside sales agents did not constitute managerial control within the meaning of the regulations. The director further concluded that the petitioner did not have a reasonable need for an executive because it was an

import business with only three employees. The director also found that the description of the beneficiary's job duties showed that the beneficiary performed some of the day-to-day, non-managerial activities; thus, the beneficiary was not acting in a managerial capacity.

On appeal, counsel re-states the assertions contained in the rebuttal. Counsel asserts that the number of employees should be considered in the context of the size, nature, and stage of the petitioner's business and that the uncomplicated nature of the petitioner's business coupled with out-sourcing business to service companies allowed the petitioner to operate with only three employees. Counsel asserts that the beneficiary is not involved in performing day-to-day routine work in sales, customer service, accounting, and shipping and receiving, but is relieved from these operations by in-house employees and outside sales groups. Counsel again contends that the beneficiary is a functional manager in terms of the petitioner's sales function. Counsel asserts that the beneficiary devotes the majority of his time to the duties associated with directing, managing, and supervising the company's day-to-day operations and that, since the business is small, the beneficiary's managerial and executive duties tend to be combined.

Counsel's claim that the beneficiary's duties comprise both managerial and executive duties does not obviate the requirement that a petitioner establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager to support such a claim. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. Moreover, counsel's assertion that the beneficiary devotes the majority of his time to duties associated with directing, managing, and supervising the company's day-to-day operations is not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's remaining contentions are also 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's first description of the beneficiary's duties was general and essentially indicated that the beneficiary would be establishing policies and procedures that related to the petitioner's various operations. A statement that the beneficiary will establish and revise policies, objectives, and procedures does not convey a complete understanding of the beneficiary's daily duties. In addition, such a statement,

if sufficiently detailed and supported with documentary evidence, fulfills only the second criteria of the executive capacity definition. See section 101(a)(44)(B)(ii) of the Act.

The petitioner also initially indicated that the beneficiary would coordinate functions and operations between departments. The petitioner's initial organizational chart contained several departments divided into sections. However, a review of the record revealed that the petitioner has not provided documentary evidence that the petitioner employed sufficient personnel to fill the various positions noted on the organizational chart. 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 also indicated that the beneficiary would recruit, train, and evaluate employees in the various departments and coordinate with the sales department manager to promote products and negotiate contracts. Recruiting, training, and evaluating employees closely resembles the criteria of section 101(a)(44)(A)(iii) of the Act but does not in and of itself establish that an individual is a manager or a supervisor. The petitioner did not initially identify a sales manager position on its organizational chart. The petitioner's organizational chart shows a sales and marketing section of a sales and warehouse department and shows an individual employed in this section but shows this individual employed in another department as well. The petitioner's initial description of the beneficiary's duties and the accompanying organizational chart are insufficient to establish that the beneficiary's assignment is primarily in an executive or managerial capacity.

The petitioner's description of the beneficiary's duties in rebuttal to the notice of intent to revoke provides more detail concerning the beneficiary's daily duties. However, the petitioner's description demonstrates that the beneficiary is primarily involved in performing various non-managerial and non-executive duties for the petitioner. For example, the beneficiary handles the purchasing and designing of products and the company logo, chooses the trade shows to attend and the businesses to target. These are activities more akin to an individual performing the duties of a buyer, promoter, and a market researcher than an individual involved in executive or managerial tasks. 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). The petitioner does not identify the amount of time

the beneficiary spends purchasing and designing products or remedying manufacturer's errors. The petitioner does not provide sufficient evidence to substantiate that the beneficiary's primary assignment is in a managerial or executive capacity rather than fulfilling the role of the petitioner's buyer, promoter, or market researcher.

The petitioner also indicates that the beneficiary oversees all decisions regarding the sales team, manages the first-line supervisor, and manages the warehouse. The petitioner does not clearly delineate the duties between the beneficiary and the individual now identified as the operations manager and does not explain how directing actions in the warehouse constitutes managerial duties. Moreover, the petitioner does not explain the inconsistencies in the two organizational charts. 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).

Counsel is correct that the number of the petitioner's employees should be considered in the context of the size, nature, and stage of the petitioner's business. The director's comment that the petitioner does not have a reasonable need for an executive because it is an import business with only three employees is inappropriate. The director should focus on applying the statute and regulations to the facts presented by the record of proceeding rather than his unsupported and undefined view of the petitioner's need for an executive based upon the size of the petitioner. The AAO also takes note that the petitioner has substantiated its use of independent contractors to perform some of the petitioner's sales functions. Nevertheless, the beneficiary is the individual who performs a number of services for the petitioner. In addition, the petitioner does not provide an initial description of the duties of the beneficiary's subordinate employee, identified as working in the sales and marketing section. It is not possible to conclude that this individual, whose title and responsibilities have apparently changed, was working in a capacity that would have relieved the beneficiary from providing operational services to the petitioner 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).

Counsel has identified the petitioner's sales function as one of the petitioner's essential functions. The record confirms that the petitioner's sales function is critical to the success of the petitioner's business. However, the petitioner has not provided documentary evidence that the beneficiary's primary assignment is managing the petitioner's sales function, rather than purchasing

products, performing market research, performing duties of a first-line supervisor, or performing other non-managerial tasks.

Further, the record is inconsistent regarding the positions and duties of the two employees subordinate to the beneficiary's position. The record is inconsistent regarding the description of the beneficiary's duties and the role counsel claims the beneficiary plays in the organization. The record does not detail the amount of time the beneficiary spends on his various duties. The AAO agrees that small businesses that out-source some functions may require the services of a manager or an executive. However, in this matter the petitioner has not provided sufficient consistent, detailed evidence to establish that it requires the services of an individual whose primary responsibility is to perform in a managerial or executive capacity and not to contribute primarily to the performance of operational and administrative tasks.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$42,000 per year.

The regulation at 8 C.F.R § 204.5(g) (2) states in pertinent part:

*Ability of prospective employer to pay wage.* 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.

The petitioner provided evidence that it had paid the beneficiary a wage of \$35,000 for the year 2000. The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for 2000 shows that the petitioner had a net income of \$1,583. The petitioner has not provided further evidence of its ability to pay the beneficiary the full \$42,000 as of the priority date in March 2001. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The AAO declines to speculate on the petitioner's ability to pay the proffered wage.



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.