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Bureau of 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 31 2003

File: WAC 02 113 55097 Office: CALIFORNIA 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:



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 denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in April 1992 in the State of California. It is engaged in the sale, marketing, trading, and distribution of food products. It seeks to employ the beneficiary as its president.¹ 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 the beneficiary will serve in a managerial and executive capacity and that the petitioner requires the services of a president whose duties qualify him as a multinational executive or manager.

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

¹ When the petition was filed, the petitioner sought to employ the beneficiary as its president. When responding to the director's request for evidence, the petitioner stated that the beneficiary's position was vice-chairman, a position above the position of president. However, 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). Therefore, the AAO will consider the facts as they apply to beneficiary's position as president.

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 has been and will be performing 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 submitted a lengthy but general description of the beneficiary's duties.² The petitioner also provided its organizational chart showing the beneficiary's position of president and the positions of administrative manager, senior manager, and manager.

The director requested further evidence including an organizational chart showing all the petitioner's employees under the beneficiary's supervision by name, title, brief job description, and source of remuneration. The director also requested a more detailed description of the beneficiary's job duties and the percentage of time spent in each of the listed duties. The director further requested copies of the petitioner's California Forms DE-6, Quarterly Wage Report for the previous four quarters.

In response, the petitioner, through its counsel, repeated the general description previously provided and noted the percentage of time the beneficiary devoted to each broadly described duty:

- 30 percent on establishing policy and directing senior executives
- 20 percent on analyzing operations, establishing policies, establishing management policies, approving budget requirements, and making decisions on capital adjustments

² The description will not be repeated here. Pertinent portions of the description will be addressed below.

- 20 percent on developing strategies, keeping abreast of marketing trends, examining legal opinions, and preparing reports for submission to the parent company
- 10 percent serving as liaison with research laboratories to expand and diversify product lines, reviewing effectiveness of product concepts and comparing with competitor's related products, and analyzing market needs
- 10 percent promoting efforts to increase economic growth and interfacing with affiliate subsidiaries and others to provide various groups with economic, marketing, and technical information
- 10 percent directing audits of records and operations, reviewing studies to improve work flow, simplify reporting procedures, and establishing record management policies

The petitioner also provided a revised organizational chart showing the positions of chairman and vice-chairman (the beneficiary's new position) on the same level. The chart also showed the president of the petitioner reporting to the chairman and vice-chairman. In turn, an administrative manager and senior manager reported to the president. Finally, the chart showed a manager, and an individual in an unidentified position reporting to the senior manager.

Counsel indicated that the president would be responsible for the day-to-day management operations, the administrative manager would be responsible for the day-to-day administrative operations, and the senior manager would be responsible for the sales operations. Counsel indicated further that the manager assisted the senior manager with sales operations. Neither counsel nor the petitioner provided information relating to the unidentified position on the organizational chart.

The petitioner also provided its California Forms DE-6 for 2001. The latest California Form DE-6 provided covered the quarter ending December 31, 2001, the quarter prior to filing the petition. The fourth quarter 2001 California Form DE-6 showed five employees. The positions held by the individuals on the California Form DE-6 included the positions of administrative manager, senior manager, and manager. The beneficiary was also included on the California Form DE-6 apparently in the position of president. The California Form DE-6 also named an individual not included on either of the petitioner's organizational charts or included in the list of employees with job descriptions.

The director observed that the petitioner's employees all held positions with managerial titles and concluded that the individuals with managerial titles must actually be performing the petitioner's operational duties. The director also noted that the job

descriptions of the beneficiary's subordinate employees did not indicate that the positions were professional. The director determined that the petitioner had not demonstrated its need for an executive because it was a five-employee company that sold, marketed, traded, and distributed food products. The director further determined that the petitioner had not provided sufficient evidence to demonstrate that the beneficiary would be a functional manager.

On appeal, counsel repeats the previously provided general description of the beneficiary's duties. Counsel asserts that the director improperly limited his review to the number of employees within the petitioning company and failed to take into account the petitioner's complexity and its parent company's global operations as a whole. Counsel cites an unpublished decision to support this assertion. Counsel also asserts that the beneficiary manages the essential function of importing, sales, marketing, and distribution of the petitioner's spice products in the United States.

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 must establish that the facts of the instant petition sufficiently convey an understanding of the beneficiary's duties coupled with substantiating documentary evidence that the beneficiary's assignment is primarily executive or managerial.

In this matter, neither counsel nor the petitioner clarifies whether the beneficiary is claiming to be engaged primarily in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. It appears the petitioner may be claiming the beneficiary is both an executive and manager; however, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Instead, 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.

The petitioner's description of the beneficiary's duties does not clearly identify the beneficiary's duties. It appears the beneficiary may perform certain tasks for the petitioner such as analyzing market trends, providing market research, making budget decisions, preparing reports, providing information regarding the petitioner's products, and implementing record keeping policies. However, these duties are more akin to an individual providing services to the petitioner rather than managing or directing such 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).

Moreover, the petitioner has not provided a consistent view of the structure and role of the employees subordinate to the beneficiary's position. For example, the description of the petitioner's purported current president's duties contradicts the description of the beneficiary's duties when the beneficiary was allegedly president. As such, the duties and responsibilities of a particular position appear dependent upon the needs of the individual occupying the position, rather than the needs of the petitioner. 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).

Finally, on the matter of the description of the beneficiary's duties, the petitioner has not provided any documentary evidence to support the description of the beneficiary's activities. 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).

Counsel's assertion that the director improperly limited his review to the number of employees within the petitioning company and failed to take into account the petitioner's complexity and its parent company's global operations as a whole is not persuasive. The AAO acknowledges that the director inappropriately speculated that the petitioner does not require an executive because it is only a five-person company that sells and distributes food products. Nevertheless, the petitioner has not provided sufficient evidence that the employees on hand when the petition was filed could meet the reasonable needs of the petitioner without the beneficiary actively participating in non-qualifying duties. In addition, as the director notes, the petitioner has not provided evidence of employees who actually perform the operational and administrative services of the petitioner, except for the four to five employees labeled with managerial or executive titles.

Counsel's citation to an unpublished decision is not persuasive. Unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c). The record does not establish that the beneficiary is primarily providing an executive or managerial service as defined by immigration regulations.

Counsel also contends that the beneficiary will have managerial authority and control over a function. Counsel states that the petitioner is responsible for the import, sales, marketing, and distribution of spice products in the United States. Counsel contends that the preparation of trade and procurement activities

requires close coordination with the parent company, vendors, buyers and sellers and that the beneficiary manages this function.

Counsel's assertion is not persuasive. The term "essential function" applies generally when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. A petitioner that claims a beneficiary is managing an essential function, 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 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 an essential function.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The descriptions of the beneficiary's job duties are general, and in addition to borrowing liberally from the definition of managerial and executive capacity, describe an individual primarily providing services to the company. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

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.