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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
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Washington, DC 20536



OCT 31 2003

File:



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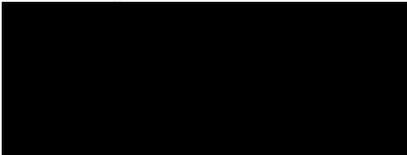
Date:

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, 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 February 1995 in the State of California. It is engaged in the import and sale of furniture and general trading. It seeks to employ the beneficiary as its executive 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 initially approved the petition. 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. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer. After properly issuing a notice of intent to revoke, the director revoked approval of the petition on February 24, 2003.

On appeal, counsel contends that the director's decision is in error.

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 first 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 of support of the petition that the beneficiary would perform executive duties including setting corporate policy, directing management, exercising discretionary decision-making, exercising control over daily operations, supervising work of employees, promoting the business, negotiating with customers, manufacturers, and suppliers, and hiring and firing employees. This description essentially paraphrases elements of the definition of managerial and executive capacity without conveying an understanding of the beneficiary's actual daily duties. See sections 101(a)(44)(A)(iii) and (iv) and section 101(a)(44)(B)(i), (ii), and (iii) of the Act. In addition, promoting the business and negotiating with customers, manufacturers, and suppliers is more indicative of an individual performing operational tasks for the petitioner, instead of performing executive or managerial duties. 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 director, however, approved the petition based on the limited information concerning the beneficiary's daily duties for the petitioner. Upon review of the record and the deficiencies of the record, the director issued a notice of intent to revoke the approval. In the notice of intent to revoke, the director noted the deficiencies of the description of the beneficiary's duties and also noted that the petitioner had provided evidence of only three full-time employees and two part-time employees. The director determined that it was reasonable to believe, based on the type of company, that the beneficiary would be assisting with day-to-day non-supervisory duties and that any of the beneficiary's supervisory duties would be as a first-line supervisor over non-professional employees.

Counsel for the petitioner responded to the notice of intent to revoke with a brief. Counsel contended that the statute was not intended to restrict eligibility of beneficiaries to those

persons who supervise a large number of persons or a large enterprise. In support of his contention, counsel also cited an unpublished decision concerning a sole employee who supervised independent contractors. Counsel also briefly described the duties of those employees under the beneficiary's supervision. Counsel stated that the beneficiary supervised an office manager who managed the daily business operations and the work of employees. The office manager's annual salary was \$13,200. In addition, counsel stated that the petitioner employed two salespersons and a delivery person. Counsel concluded that this evidence was sufficient to establish that the beneficiary is and would be a manager or executive for the petitioner.

The director determined that counsel's contentions were not persuasive and found that the record contained insufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the beneficiary manages the United States entity, hires personnel, supervises the work of professional employees (the office manager and sales clerks), and exercises discretion over the day-to-day operations of the United States entity. Counsel also asserts the size of the corporation and the number of employees being supervised is irrelevant. Counsel again asserts that the statute is not intended to restrict eligibility to persons who supervise a large number of persons or a large enterprise. Counsel again cites an unpublished decision and again submits a description of duties for the three employees under the beneficiary's supervision.

Counsel's assertions are 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). The record does not contain evidence that the beneficiary supervises positions that are professional in nature. Neither the position descriptions nor the salaries of the beneficiary's subordinate employees indicate that these individuals were engaged as or compensated for positions that are professional or managerial. 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 size of the petitioner is irrelevant is incomplete. If the director considers staffing levels as a factor in determining whether an individual is acting in a managerial or executive capacity, the director must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In

this matter, the petitioner was a four-year-old company when the petition was filed. At that time, the petitioner employed the beneficiary, an "office manager," a full-time sales clerk, a part-time sales clerk, and a part-time delivery person. The record contains insufficient evidence to establish that the beneficiary's subordinate employees could serve the reasonable needs of the petitioner without the beneficiary contributing to the performance of a majority of the operational tasks of the company. It is not possible to determine from the record that the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed.

Counsel's citation to an unpublished case is also not persuasive. First, the evidence in this matter is not analogous to the evidence in the unpublished matter. Second, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

In sum, the petitioner has not established that the beneficiary's primary assignment for the petitioner has been or will be managerial or executive. The petitioner's description of the beneficiary's duties is general and borrows liberally from the definitions of managerial and executive capacity. See section 101(a)(44)(A) and (B) of the Act. The petitioner's only description of the beneficiary's actual duties indicates that the beneficiary is primarily involved in promoting the company and negotiating contracts. These duties are not primarily managerial or executive. Moreover, the petitioner does not provide evidence that it employs a sufficient number of individuals or uses independent contractors to relieve the beneficiary from primarily performing non-qualifying duties. The petitioner has not provided sufficient evidence to overcome the director's decision in this matter.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

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

*Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

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.

The director determined the record contained inconsistencies regarding the ownership and control of the petitioner. The director observed the petitioner's statement that the beneficiary's foreign employer initially invested \$150,000 in the petitioner. The director also noted that the record contained a copy of a wire transfer of \$99,985 to the beneficiary's checking account. The director further noted that the petitioner's Notice of Transaction filed with the California Commissioner of Corporations showed that \$30,000 in cash was transferred to the petitioner to pay for the issuance of 30,000 shares of stock. The director also considered the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporate Income Tax Return. The forms show that the petitioner issued common stock valued at \$70,000 and that the beneficiary owned 100 percent of the petitioner. The director determined that the petitioner had not provided sufficient consistent evidence to establish a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the same three individuals own the petitioner and the beneficiary's foreign employer in approximately the same proportion; therefore this ownership creates an affiliate relationship. Counsel lists the evidence already before the director and asserts that the evidence establishes a qualifying relationship between the petitioner and the beneficiary's foreign employer. Counsel states that the petitioner has submitted amended IRS Forms 1120 for the years 1997, 1998, 1999, 2000, and 2001 and has provided the amended returns to CIS.

Counsel's assertions are not persuasive. A review of the record reveals the same inconsistencies the director noted. The record does not contain amended IRS Forms 1120. The record contains a certification from the beneficiary dated August 15, 2002 that copies of the petitioner's IRS Form 1120 for the years 1997 through 2001 are true and complete copies of the original tax returns filed with the IRS. These copies show that the petitioner issued common stock valued at \$70,000 and that the beneficiary owned 100 percent

of the petitioner. As the director concluded, these two facts contradict the petitioner's claim it had issued only 30,000 shares to three individuals in the same proportion. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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 provided insufficient evidence to overcome the director's decision on this issue.

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.