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



OCT 31 2003
Date:

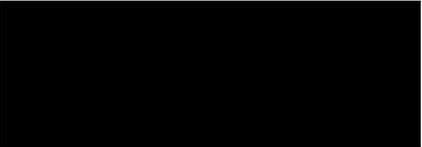
File: WAC 02 161 50610 Office: CALIFORNIA SERVICE CENTER

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 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 company organized in February 2001 in the State of California. It is engaged in the export and wholesale of general merchandise. 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 would be employed in a managerial or executive capacity for the petitioner.

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

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 that the beneficiary would perform in a managerial capacity as president of the petitioner. The AAO notes the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged 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. 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.

The petitioner indicated in its letter supporting the petition that the beneficiary "oversees a professional and support staff of seven (7) and is currently still in the process of hiring professionals and staff." The petitioner also indicated that the beneficiary "exercises authority in regard to hiring, firing, training, delegation of assignments according to capabilities, references and professional goals, discipline, promotions, and remuneration" and that he "regularly conducts performance reviews and ensures that his staff follows corporate procedures." The petitioner further stated "[c]urrently the beneficiary] is performing the duties of the proposed positions which include, Marketing Manager, Sales Manager, Inside Sales, Purchasing Manager/Wholesale Buyer, and Accountant." The petitioner indicated that gradually the beneficiary would train new recruits to fill positions so that the beneficiary could focus on directing the management of the organization and serving as the liaison between the United States subsidiary and the Hungarian parent company.

The petitioner included its employee list showing that it currently employs the beneficiary and six other individuals. The petitioner also included its organizational chart showing the beneficiary as president and individuals in the positions of web developer, researcher, outside sales, office manager, customer service representative, and general office clerk. The petitioner provided brief job descriptions for the individuals currently employed and brief job descriptions for positions currently unfilled.

The director requested additional evidence to establish that the beneficiary's primary assignment would be in an executive or managerial capacity. The director specifically requested the

petitioner's recent California Forms DE-6, Quarterly Wage Reports and descriptions of the job duties for all employees under the beneficiary's supervision.

In response the petitioner listed the beneficiary's duties and the percentage of time spent on those duties:

He spends approximately 20% of [sic] maintaining his clientele through communicating with the company's international trading partners to ensure continuous trading procedures; He spends about 15% of his time working with and overseeing his managerial and support staff in order to implement any new policies, amend any existing policies or assess any departmental concerns or situations; [The beneficiary] spends about 15% of his time managing the company's sale of international products, based on market research and by following corporate wide-sales strategies in order to meet the demands of the U.S. market; He spends approximately 10% of his time relaying sale, client, or any pertinent business information to the foreign company through conference calls or business visits; He spends about 10% of his time evaluating the timely adjustment of marketing strategies and planning to meet the changing market and competitive conditions of the United States, China and Hungary while overseeing the management and execution of regulatory plans designed to meet governmental approval for new or existing products; He spends approximately 20% of his time conducting his day-today [sic] business of interviewing, hiring and training new employees, promoting or terminating existing employees and taking on the responsibility of the overall quality control of the company.

The petitioner also submitted its California Forms DE-6 for its last three quarters including the quarter in which the petition was filed. Counsel indicated that the petitioner only had California Forms DE-6 for three quarters because the petitioner had only been active for three quarters. The California Form DE-6 for the quarter in which the petition was filed showed seven employees, the beneficiary, persons holding the positions of web developer, researcher, outside sales, office manager, customer service representative, and general office clerk.

The director determined that the petitioner's job description for the beneficiary's duties did not establish that the position was either a managerial or executive position or that the petitioner was sufficiently complex to warrant an employee in a managerial or executive position. The director also noted the petitioner's initial description of the beneficiary's duties indicated that the beneficiary would be performing a number of tasks associated with the unfilled positions of marketing manager, sales manager, inside sales, purchasing manager/wholesale buyer, and accountant.

The director determined that the beneficiary's performance of these duties coupled with the petitioner having only one other full-time employee and five part-time employees would require the beneficiary to assist in numerous non-executive/managerial tasks. The director further determined that the petitioner had not submitted evidence to establish that the beneficiary was a first-line supervisor over professional employees or was a functional manager.

On appeal, counsel contends that the size of the petitioner is irrelevant to qualifying the beneficiary under the "L category." Counsel also contends that the petitioner's business is more complex than transferring goods to and from the United States. Counsel indicates that the petitioner has entered into a contract with a lumber company to effectuate the transfer of lumber to China. Counsel asserts that the lumber company is comparable to an independent contractor for the purpose of establishing the beneficiary's managerial capacity. Counsel also asserts that the petitioner's description of the beneficiary's duties that was used by the director in making his decision described a transitional period in the history of the petitioner. Counsel notes that at the time of the response to the director's request for evidence the petitioner was still in the process of hiring and training individuals to fill the proposed managerial positions. Counsel submits a revised description of the beneficiary's duties for consideration. Counsel further asserts that when the petition was filed the beneficiary, although involved in the petitioner's marketing, sales, purchasing, and accounting aspects, was not performing the duties associated with these tasks. Instead, the beneficiary was spending the majority of his time training professionals to take over these positions.

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 indicated that the beneficiary would be involved in "performing the duties of the proposed positions which include, Marketing Manager, Sales Manager, Inside Sales, Purchasing Manager/Wholesale Buyer, and Accountant." When the petitioner responded to the director's request for evidence, the petitioner did not submit evidence that individuals had been hired to fill the proposed positions listed on the petitioner's organizational chart. Even if individuals had been hired to fill the positions by the time the response was filed, thereby relieving the beneficiary from performing the duties listed, the beneficiary would not have been eligible for this visa classification. 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).

In addition, the record does not substantiate counsel's assertion on appeal that the beneficiary was not primarily performing the

duties of a marketing manager, sales manager, inside sales, purchasing manager/wholesale buyer, and accountant but instead was training individuals to fill the positions. 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).

Further, the petitioner's description of the beneficiary's duties in response to the director's request for evidence also shows that the beneficiary's primary responsibility is purchasing and generating sales for the United States company. It is not possible to conclude from the description that the beneficiary's primary assignment is to perform duties that are managerial or executive, instead of primarily performing operational, administrative, or supervisory 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).

Furthermore, counsel's contention that entering into a contract with an outside concern is equivalent to entering into a contract with an independent contractor is not persuasive. The beneficiary does not have the authority to supervise and control the work of the individuals employed by the outside concern. The only rights and obligations the petitioner (not the beneficiary) has in relation to the outside concern will be governed by the contract entered into. The AAO will not extend the concept of managerial control to individuals employed by unrelated concerns in this matter.

Finally, counsel contends that the size of the petitioner is irrelevant to qualifying the beneficiary under the "L category"¹ and that the petitioner's business is more complex than transferring goods to and from the United States. Counsel's contentions are not on point. If a director uses a petitioner's 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 had not yet been

¹ Counsel incorrectly identifies the visa classification pertinent to this proceeding by referencing the "L category." This proceeding concerns an immigrant employment-based I-140(c) category.

doing business for a year when the petition was filed.² When the petition was filed, the petitioner did not have sufficient staff to relieve the beneficiary from primarily performing non-qualifying duties. The petitioner and counsel confirm this fact by indicating that the beneficiary was performing the duties of the positions involved in purchasing, marketing, and sales; consequently, the petitioner has failed to establish the managerial or executive capacity of the beneficiary's duties.

Admittedly, the director drew inappropriate conclusions regarding the petitioner's reasonable need for an executive. Nonetheless, the record does not support the petitioner's claim that at the time the petition was filed the beneficiary's position was primarily managerial or executive.

Beyond the decision of the director, the petitioner has not established that it had been doing business for one year prior to filing the petition. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(d) requires the petitioner to submit evidence that it has been doing business for at least one year prior to filing the petition. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

In this matter, the petitioner was organized in late February 2001. The earliest invoices and bills of lading provided for the record were dated in May 2001. It did not obtain a business license until May 2001. In the petitioner's response to the director request for the petitioner's California Forms DE-6, the petitioner acknowledged that it had only been active for the previous three quarters; thus, the earliest California Form DE-6 available was for the quarter ending December 31, 2001. The petitioner did not enter into a lease for business premises until February 2002. The petition was filed April 15, 2002. The petitioner has not established that it was doing business for one year prior to filing the petition.

The petitioner has also not established its ability to pay the beneficiary the proffered wage of \$60,000 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

² The lack of doing business for a year prior to filing the petition will be addressed below.

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's Internal Revenue Service (IRS) Form 1120, U.S. Corporate Income Tax Return for 2001 shows that the beneficiary was paid \$10,000 for the year. The IRS Form 1120 shows only a net income of \$510. The petitioner's California Forms DE-6 for the first two quarters of 2002 show that the beneficiary was paid \$9,999 for each quarter. The record does not include further evidence of the petitioner's ability to pay the proffered wage of \$60,000. The information in the record is not sufficient to establish that the petitioner has the ability to pay the proffered wage.

For these additional reasons the petition will not be approved.

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.