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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

[Redacted]

File: WAC 01 008 50092 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

NOV 19 2002

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)

IN BEHALF OF PETITIONER:

[Redacted]

**PUBLIC COPY**

**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Nevada in 1997. It is engaged in theater operations. 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's duties had been or would be primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the beneficiary is a functional manager who directs the management of his corporation and works as a consultant managing theater shows.

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 beneficiary and his wife jointly own the outstanding shares of the petitioner. The beneficiary also apparently owns the outstanding shares of the claimed affiliated Canadian company. The petitioning enterprise filed an Internal Revenue Service (IRS) Form 1120-S, U.S. Income Tax Return for an S Corporation for the years 1997, 1998, and 1999. The 1997 and 1999 Forms 1120-S reveal no salaries paid to employees and no compensation paid to officers. The 1998 Form 1120-S reflected conflicting information regarding \$14,110 possibly paid to an officer. The 1999 Form 1120-S revealed ordinary income in the amount of \$104,705. The primary asset of the petitioning enterprise appears to be the agreement entered into by the petitioner and the beneficiary as an individual collectively identified as "consultant" to [REDACTED] owner of a Las Vegas magic show.

The issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

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 provided the beneficiary's resume. The resume indicated that the beneficiary had been employed from June 1997 to present as a "Theatre Operations Consultant" for the Lance Burton Theatre. The beneficiary's duties in that position included maintaining and monitoring the "front of house operations" for the Lance Burton magic show in Las Vegas. The beneficiary's duties more specifically included the following:

- Compile ticket sales data and recommend strategies on marketing and promotion.
- Protect the interests of [REDACTED] Inc. with relation to the operation of the venue.
- Advise on staff union concerns and negotiations.

The petitioner also provided an agreement entered into among Lance Burton, Inc., the beneficiary and the petitioner dated January 2000 for a term of two years. The agreement referred to the petitioner and the beneficiary collectively as the "consultant." The agreement indicated that Lance Burton, Inc. desired the services of the "Consultant in connection with designing, constructing of props, developing a local, national and international marketing campaign and assisting in staffing requirements and responsibilities." The agreement also indicated that the beneficiary "is an agent and employee of Consultant whose services are specifically desired by Burton."

The director requested a more detailed description of the beneficiary's duties in the United States and the beneficiary's exact job title as well as a list of the petitioner's permanent employees.

In response to the director's request the petitioner provided a

letter from Lance Burton stating that the beneficiary "reports directly to me and provides financial and guest status reports to my business and personal managers." The petitioner also provided a letter from [REDACTED] personal manager stating that the beneficiary managed and directed the ushers at the hotel theater and that the ushers were an integral part of the magic show. The letter also indicated that the hotel directly employed the ushers. The letter further stated that "[the beneficiary] is the Theatre Operations Manager at the Lance Burton Theatre for the [REDACTED] Show" and detailed the beneficiary managerial duties and responsibilities as the theater manager. The petitioner further provided its organizational chart depicting the beneficiary at the top of the structural hierarchy, and [REDACTED] as directly under the beneficiary, and eleven theater ushers, a merchandise sales unit, and a ticket sales unit directly under [REDACTED]

The director determined that the beneficiary was acting in the capacity of a first-line supervisor of non-professional employees. The director concluded that the petitioner had not shown that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner repeats the beneficiary's job descriptions previously submitted. Counsel cites several unpublished decisions and asserts that a functional manager or executive may be approved for this classification if the functions managed are specialized business functions.

Upon review, the petitioner has not established that the beneficiary is or will be employed in a managerial or executive capacity for the petitioner. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner provided only the beneficiary's resume and the agreement among the beneficiary and the petitioner as "consultant" and [REDACTED] Inc. Neither document provided a comprehensive description of the beneficiary's duties for the petitioner. The few duties that were outlined, such as "maintaining and monitoring the 'front of house operations' for the [REDACTED] magic show," and "compil[ing] ticket sales data and recommend[ing] strategies on marketing and promotion," and "advise[ing] on staff union concerns and negotiations," are more indicative of an individual performing consulting tasks for another entity. Likewise, the tasks for the beneficiary to perform as the consultant to the magic show such as "designing, constructing of props, developing a local, national and international marketing campaign and assisting in staffing requirements and responsibilities," are also directly related to the performance of certain duties as a consultant. The petitioner provided no evidence that the beneficiary would be managing an essential function of the petitioner rather than performing tasks as a consultant for an unrelated entity. 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 response to the director's request for evidence provides more detail regarding the beneficiary's specific duties but each of the duties and responsibilities detailed in the letter from Lance Burton's personal manager again indicate that the beneficiary is performing the necessary tasks to assist in the production of a magic show. The petitioner provided no documentation to indicate that the beneficiary directs the management of any of the petitioner's functions or manages any of the petitioner's functions. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, the letter from [REDACTED] stating that the beneficiary reports directly to [REDACTED] is contradicted by the petitioner's oddly drawn organizational chart depicting [REDACTED] reporting to the beneficiary. 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's conclusion that the beneficiary directs and manages eleven ushers is also not supported by the record. As the director determined the beneficiary's supervision of the eleven ushers is at most the duty of a first-line supervisor of employees in non-professional positions. Although the ushers may be an integral part of the magic show, the position of an usher is not a professional one. Moreover, a theater manager may be an integral part of a theater operation, but the duties and responsibilities described for the theater manager in this case evidence an individual performing necessary tasks, such as "opening the theater each night and directing the actions of the ticket takers and ushers."

Counsel's citation to several unpublished decisions is without merit. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those unpublished decisions cited. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c). Counsel's contention that a functional manager or executive may be approved for this classification if the functions managed are specialized business functions is irrelevant as neither counsel nor the petitioner have provided a clear description of the "specialized business functions" managed and not performed by the beneficiary.

The record contains insufficient evidence to demonstrate that the

beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The record does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Rather, the description of the duties to be performed by the beneficiary are more indicative of an individual primarily performing the basic operations for an unrelated entity. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner's tax returns and the agreement entered into by the petitioner and the beneficiary collectively draw into question the legitimacy of the petitioner's corporate structure for immigration purposes. The petitioner's tax returns do not reflect payment to any employees or to an officer for the years 1997 and 1999. The petitioner's 1998 tax return indicates that an officer was paid \$14,110 on the first page but does not note this payment on Schedule E of the same tax return. It is not clear how the petitioner generated the revenue depicted on each tax return. The petitioner's agreement with [REDACTED] states that the beneficiary remain an agent and employee of the petitioner because it is the beneficiary's services that are specifically desired by [REDACTED].

This requirement coupled with the lack of evidence regarding the petitioner's source of gross receipts and the petitioner's failure to compensate an officer raise serious concerns regarding the petitioner's ability to do business in the United States. See 8 C.F.R. 214.2(1)(1)(ii)(H). In addition, the petitioner has not established its ability to pay the proffered wage to the beneficiary. Further, the petitioner's broad description of the beneficiary's duties for the claimed foreign entity is indicative of an individual performing the duties of theater manager not of an individual performing executive or managerial duties with respect to those activities. Finally, the ownership of the petitioner is also questionable as IRS regulations for S corporations do not allow foreign or corporate ownership. Internal Revenue Code § 1361 (a) and (b).

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, the petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.