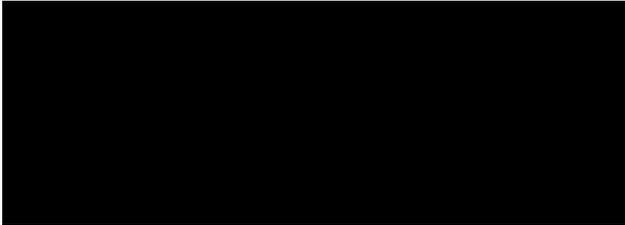




U.S. Citizenship
and Immigration
Services



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **OCT 25 2004**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

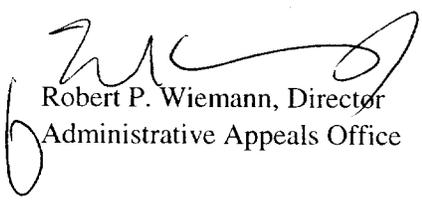
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent disclosure of information
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DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Florida partnership that seeks to employ the beneficiary as its operations director. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition concluding that: (1) the beneficiary was not employed by the foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States as a nonimmigrant; and (2) the proffered position is not in managerial or executive capacity.

On appeal, the petitioner states that it is shocked by the director's denial of the petition because the beneficiary is the founder and majority owner of the U.S. and foreign entities and has been working as a director of operations for more than 20 years.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it is affiliated with Hebden Entertainments in the United Kingdom (Hebden U.K.), and specializes in the provision of musicians and related services to entertainment facilities, theaters, promoters, clubs, restaurants, and cruise lines. When filing the I-140 petition, the petitioner claimed that it employed six persons, and that the beneficiary was working at Hebden U.K. as the operations director. The petitioner is offering to employ the beneficiary permanently at a salary of \$65,000 per year.

The first issue to be discussed in this proceeding is whether the beneficiary's job with Hebden U.K. is in a managerial or executive capacity. Pursuant to 8 C.F.R § 204.5(j)(3)(i)(A), the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding the filing of the petition.

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.

At the time of filing the petition with the Texas Service Center, the petitioner indicated that the beneficiary's duties with Hebden U.K. included managing and planning all functions, controlling the activities of managers and professional personnel, and maintaining authority over personnel decisions. The director was not satisfied with the petitioner's description of the beneficiary's job duties and, therefore, on March 18, 2002, she requested that the petitioner provide detailed information regarding the beneficiary's foreign position. The director asked the petitioner to specify the beneficiary's daily duties, the number of people he supervises, and the titles of their positions.

In response, the petitioner stated that the beneficiary supervises 12 people, but failed to provide the titles of these individuals' positions. The petitioner described the beneficiary's duties as:

To take charge of all day-to-day functions of the business and to direct the work of all executives. He is in charge of all personnel matters and supervises all hiring and firing. He scouts out potential clients, oversees the company representatives and develops new marketing strategies. He is also the main P.R. and negotiating man.

The director determined that the beneficiary's employment with Hebden U.K. is not in a managerial or executive capacity because the beneficiary is performing the essential services of the company. The director noted further that the beneficiary's ownership interest in Hebden U.K. is not related to whether his job duties fit the definition of managerial or executive capacity.

On appeal, the petitioner does not address specifically the director's conclusions. The petitioner's appeal discusses the proffered U.S. position only and how it conforms to the definition of executive or managerial capacity. As the petitioner fails to address how the beneficiary's foreign employment is in a managerial or executive capacity, the AAO shall not overturn the director's findings on this issue. The AAO does note, however, that even if the petitioner had provided rebuttal evidence, the AAO still would not have disturbed the director's ruling. In her request for evidence, the director asked specifically for the titles of the persons that the beneficiary supervises at Hebden U.K.; however, the petitioner failed to provide this information when responding to the director's request. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The second issue to be discussed is whether the beneficiary's proposed job with the petitioner will be in a managerial or executive capacity.

When filing the I-140 petition, the petitioner indicated that the beneficiary's duties with the U.S. entity would include managing and planning all functions, controlling the activities of managers and professional personnel, and maintaining authority over personnel decisions. The director was not satisfied with the petitioner's description of the beneficiary's job duties and, therefore, on March 18, 2002, she requested that the petitioner provide the following evidence; (1) an organizational chart that listed all employees by name and title; (2) a brief description of all employees' duties; (3) copies of paystubs or W-2 forms; and (4) a description of the beneficiary's daily duties, including the percentage of time that the beneficiary will spend on each duty.

In response, the petitioner listed five employees within its U.S. operations, one of whom was the beneficiary. The remaining four employees were one executive secretary and three account representatives. The petitioner stated that the beneficiary's duties in the United States would be exactly the same as his duties in the United Kingdom. In addition, the petitioner stated that the approximate percentage of time spent on each duty would be:

1. Research new clients and maintain existing clients – 35%
2. Scout new talent – 15%
3. Provide general management, financial and marketing duties – 30%
4. Manage account representatives, and personnel matters – 20%

The director also determined that the proffered position would not be in a managerial or executive capacity because the beneficiary would be performing the services of the company. Again, the director stated that the beneficiary's ownership interest in the petitioner did not bear on whether his employment would qualify under the statute.

On appeal, the petitioner states that the beneficiary will have complete and absolute control over all of the company's operations, and that the beneficiary will direct the work of managers and supervisors. According to the petitioner, it hired two managers in September 2002 who will report directly to the beneficiary. In addition, the petitioner states that the beneficiary will be responsible for all contract negotiations, planning the company's strategy, implementing policies, and overseeing the marketing, public relations, financial, and scouting activities of the company.

The petitioner's statements on appeal do not merit a withdrawal of the director's decision to deny the petition. As shall be discussed, the evidence fails to establish that the beneficiary would primarily execute the high level responsibilities that are specified in the definition of managerial or executive capacity.

When comparing the beneficiary's job description that the petitioner presented in response to the director's request for evidence to the job description that the petitioner submits on appeal, it is apparent that the petitioner has amended the beneficiary's duties to conform to Citizenship and Immigration Services (CIS) requirements. Previously, the petitioner stated clearly that 80 percent of the beneficiary's time would be spent performing essential services for the petitioner's operations in the areas of client development, hiring of performers, and marketing. Now on appeal, the petitioner attempts to show that the beneficiary would be managing these areas and not actually performing the duties associated with them. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The evidence submitted prior to the director's denial shows that the beneficiary's involvement with the company will be as a purveyor of the company's services. An individual who performs the tasks that are integral to a company's ability to provide its services does not work in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988).

The petitioner's organizational chart also shows that the beneficiary does not manage the company through managerial, supervisory or professional employees. On appeal, the petitioner indicates that the beneficiary directs

the work of all managers and supervisors; however, the organizational charts lists no managerial or supervisory employees; the petitioner is comprised only of an executive secretary and three account representatives. Although the petitioner states on appeal that it hired two managers in September 2002, the managers were not present when the petitioner filed the I-140 petition and, therefore, the AAO cannot consider their impact on the company's operations. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Nothing in the organizational chart or in the employees' job descriptions indicates that the beneficiary would function at any level higher than a first-line supervisor of nonprofessional employees.

The beneficiary's ownership interest in the petitioner is not a sufficient reason to approve the petition. Regardless of the beneficiary's financial interest in the company, the petitioner is required to demonstrate that the beneficiary will perform the duties that are outlined in the definition of managerial or executive capacity. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). As stated previously, the evidence indicates that 80 percent of the beneficiary's time will be spent as a talent scout and sales representative/marketer. The management aspects of the beneficiary's job are merely ancillary to his primary job duties, which are to market the company's services and sign talent to fulfill its contractual obligations. Accordingly, the position offered to the beneficiary is not in an executive or managerial capacity, and director's decision to deny the petition on this basis shall not be disturbed.

Beyond the decision of the director, there is insufficient evidence of a qualifying relationship between the petitioner and Hebden U.K. The petitioner claims that it and Hebden U.K. are partnerships, with [REDACTED] (the beneficiary) owing 60 percent of each partnership and [REDACTED] owning the remaining 40 percent of each partnership. Pursuant to 8 C.F.R. § 204.5(j)(2), an affiliate is defined, in part, as "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." As evidence of each partnership's ownership, the petitioner submitted copies of each company's partnership agreement, which outlines the amount of monies that each individual contributed for his partnership interest. The record does not, however, contain proof that each individual paid for his interest in each partnership. In addition, the record does not contain copies of the petitioner's income tax returns as evidence of its legal status. Although the director did not discuss this issue in her denial letter, it is a third reason why the petition may not be approved. If the U.S. and U.K. entities do not share a qualifying relationship, then the beneficiary may not derive a benefit under this immigrant visa category.

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.