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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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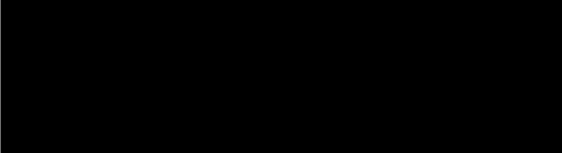
Date: **FEB 25 2003**

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)

IN BEHALF OF PETITIONER:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rose
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa and the matter is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner is a Delaware corporation that manufactures and sells door hardware. It seeks to employ the beneficiary as its business manager and, 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 on the basis that the proffered position is neither executive nor managerial in nature.

On appeal, counsel submits a brief. The petitioner submits job descriptions of the proffered position and the customer service coordinator position. Counsel states, in part, that the director ignored evidence in the record when he determined that the proffered position did not qualify as a primarily executive or managerial position.

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.

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. 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 describes itself as a subsidiary of Forecast Australia that is engaged in industrial steel manufacturing, specifically, the manufacture and sale of door hardware. The petitioner also states that it has been operating a manufacturing plant in Tijuana, Mexico. At the time of filing the petition on November 17, 2000, the petitioner employed one person (the beneficiary) and had a gross annual income of \$290,000. According to the petitioner, it currently employs the beneficiary as its business manager in L-1A nonimmigrant status. It is offering to the beneficiary the same position on a permanent basis at an annual salary of \$80,000.

The petitioner describes the proffered position as follows:

As Business Manager, North America, [the beneficiary] is responsible for developing and maintaining all aspects of [the petitioner's] business interests in North America, which serves as [the overseas entity's] predominant customer base. [The beneficiary] is responsible for strengthening [the petitioner's] present business activities in North America, which represents [sic] between 60-70% of [the company's] overall revenue totals. [The beneficiary] is also responsible for managing the development of new markets for [the company's] products, coordinating the implementation of a new management system in North America, and overseeing the continuing relocation of manufacturing processes from the [company's] plant in Melbourne, Australia to the plant in Tijuana, Mexico. [The beneficiary] also assumes total responsibility for the sales performance of the North American market as well as the overall profitability of [the company's] North American operations. In addition, he oversees the implementation and maintenance of new and continuing accounting and administration procedures, including legal compliance.

The director found that the proffered position was neither executive nor managerial in nature, and he denied the petition. The director noted that the petitioner had only one employee who was the beneficiary and concluded that the beneficiary would perform the sales and accounting duties of the petitioner's operations, as the beneficiary was "not managing the business through other people."

On appeal, counsel states that the law does not require a manager to supervise other people in order for him or her to be working in a managerial capacity. Counsel states that the director ignored evidence that the petitioner submitted, which indicated that the petitioner employed a customer service coordinator in addition to the beneficiary. Counsel asserts that the evidence clearly shows that the proffered position is in both executive and managerial capacities because the beneficiary is in charge of directing the

management of the organization, has the authority to hire and fire personnel, and exercises discretion over the day-to-day operations of the petitioner's business.

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.

Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), provides that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Instead, an executive's or manager's duties must be the critical factor. *Systronics Corp. v. I.N.S.*, 153 F.Supp.2d 7 (D.D.C. 2001).

It is important to emphasize that the Service is limited to looking at the petitioner's staffing levels as they existed at the time of filing the petition on November 17, 2000. A petitioner must establish eligibility at the time of filing the immigrant petition; an immigrant 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). Therefore, while counsel claims that the director ignored evidence that the petitioner was a two-person operation rather than a one-person operation, the director was simply unable to take the change in staffing levels into consideration when determining whether the petitioner had a reasonable need for the proffered position in light of its staffing levels, overall purpose and stage of development. It is the petitioner's organizational structure at the time of filing the petition that is relevant in the adjudication of this petition.

The petitioner's staffing levels at the time the petition was filed consisted of the beneficiary as the business manager. The Service concurs with counsel that an individual need not supervise or control other individuals in order to qualify either as a multinational manager or a multinational executive; an individual may either direct the management of a function or directly manage a function. However, 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. I.N.S.*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. (Wash.) July 30, 1991) (emphasis in original).

The petitioner has not established the first part of the test for determining whether the proffered position is in an executive or managerial capacity, namely that the proffered position involves

the high level responsibilities specified in either definition. The petitioner is in the business of manufacturing and selling door hardware. In the 2000 calendar year, the petitioner enjoyed \$280,953 in sales according to its 2000 federal income tax return; yet, the petitioner does not submit any evidence that it employs sales persons either on the company payroll or on a contractual basis. The director raised this issue in his denial letter; however, on appeal, neither counsel nor the petitioner addresses how the sales of the petitioner's products in the North American market are accomplished. Thus, the Service must conclude that the proffered position is involved in the sale of the petitioner's products in the North American market. 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 (Comm. 1988).

Additionally, the description of the proffered position that the petitioner submits on appeal lacks detail in some areas, and also ascribes duties to the proffered position that are not indicative of an individual who primarily devotes his time to executive or managerial tasks.

Regarding the level of detail of the job description, the petitioner states that the proffered position entails "new business development." However, the petitioner fails to explain the activities that the beneficiary would undertake in the proffered position to develop new business. The Service cannot assume that any activity associated with this generalized job duty would be at an executive or managerial level. Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). Without a listing of the specific activities associated with the job duty of "new business development" and the amount of time devoted to these activities, the Service cannot conclude that the job duty of "new business development" is a high level responsibility of an executive or manager.

Furthermore, the proffered position entails duties such as "purchasing," "quality control," and "financial management." The rather vague description of "purchasing" requires the beneficiary to establish relationships with suppliers and purchase supplies. The duty of "quality control" involves "extensive liaison with customers," and the financial management aspect of the proffered position calls for responsibility over cashflow analysis, budgets, accounting and bookkeeping. None of these three job duties relates to either directing the management of a function or directly managing a function.

The actual duties themselves reveal the true nature of the

employment. *Fedin Bros. Co., Ltd. v. Sava, id.* At the time the petition was filed in November of 2000, the petitioner's overall purpose and stage of development did not require the services of an individual in a primarily executive or managerial capacity. The true nature of the proffered position is not to primarily direct the management of a function or directly manage a function; it is to sell and market the petitioner's products in the North American market. For the reasons stated above, the Service does not find that the proffered position merits classification as a multinational executive or managerial position. The director's decision will not be disturbed.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.