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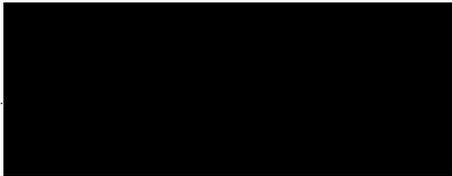
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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**



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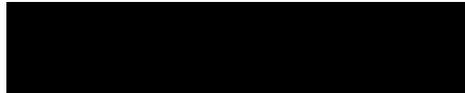


Office: CALIFORNIA SERVICE CENTER

MAR 25 2004
Date:

IN RE:

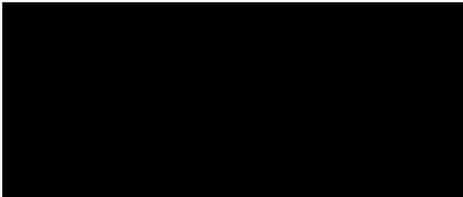
Petitioner:



Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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

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

The petitioner is a corporation organized in the State of California in December 1998. It markets and sells handicrafts. 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 United States entity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer.

On appeal, counsel for the petitioner asserts that the director applied the law inappropriately and provided an analysis inconsistent with the information provided.

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 petitioner has established that the beneficiary will be employed in a managerial or executive capacity.

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 describes the beneficiary's executive capacity as:

- Establishment of Business Objectives and Policies in accordance with the parent company's proprietary business procedures and policies;
- Development and Merchandising of Products by directing various surveys on competitors' new products, and analyzing similar products in the market, examining new products introduced on [sic] various industrial publications, and making final decisions on the selection/production of new items to be released in the U.S. market;
- Monitoring and Analysis of market tariffs, customs regulations and international market fluctuations concerning the marketing of handcrafted products in the U.S. market;
- Negotiation of Contracts to secure a broader clientele base in the United States by offering and accepting prices, terms and conditions mutually beneficiary for both the company and the customers;
- Final Placement of Production Orders after thoroughly reviewing customer requirements and contractual conditions;
- Monitoring of Production Operations in China to ensure that both the quality and quantity of products meet with customers' needs;
- Supervision of Logistics Operations to ensure timely and accurate distribution of products as ordered by customers, including prompt customs clearance of inbound shipments and appropriate warehousing of products;
- Strategic Marketing and Sales through active participation in relevant trade shows, and advertisement of products in audience-or interest-specific publications;
- Planning and Management of Annual Budget, and Supervision of Accounting to ensure the optimization of cash flow to avoid any interruption in the company's business operations due to budget scarcity; and
- Overall Supervision of Employees including 5 professionally degreed personnel engaged in Marketing and Administration & Accounting, and 2 full-time employees involved in Receiving and Packing & Shipping.

The petitioner also provided its organizational chart showing the beneficiary in the position of president over three departments: the marketing department, the administration and accounting department, and the warehouse and showroom department. The marketing department consisted of a manager and an assistant manager, the administration and accounting department consisted of a manager and an administrative assistant, and the warehouse and shipping department consisted of a manager, a receiving clerk, and a packing and shipping person. The organizational chart did not show a sales division. The petitioner provided a partial copy of its California Form DE-6, Employer's Quarterly Wage Report, for the quarter ending just prior to filing the petition.

The record also included numerous invoices and e-mail transmittals. The beneficiary signed many of the invoices and e-mails. One such e-mail signed by the beneficiary stated "I am a mosaic artist and the owner of the company." Other e-mails signed by the beneficiary were clearly sales solicitations for the company's product. The record also contains other e-mails referencing individuals with the same last name as the beneficiary. Because the first names of these individuals have been Americanized, it is not clear how many names or variation of names apply to the beneficiary.

The director requested the petitioner's California Form DE-6 for the third and fourth quarters of 2002. The petitioner, in response, provided its California Form DE-6 listing individuals in the positions identified on its organizational chart.

The director determined that the beneficiary's job description did not establish that the beneficiary's duties would be primarily managerial or executive, observing that some duties were more indicative of an individual in a sales or marketing capacity. The director questioned the reasonableness of an organization employing a president, four managers, an administrative assistant, a packing and shipping clerk, and a part-time receiving clerk and determined that the beneficiary would be assisting with the day-to-day non-supervisory duties. The director further determined that the petitioner had not established that the positions subordinate to the beneficiary were so complex as to require a college degree. The director concluded that the beneficiary was actually a first-line "manager" who would not be supervising professional employees. The director also concluded that the beneficiary would not manage or direct a function but would primarily perform the petitioner's operational activities.

On appeal, counsel contends that the director failed to list the duties that led to his conclusion that the beneficiary's duties were more indicative of an individual employed in a sales or marketing capacity. Counsel claims that the director did not consider the petitioner's organizational structure and the nature of the petitioner's business when concluding that the beneficiary would be performing tasks that preclude his consideration as an executive. Counsel asserts that the director concluded, without discussion, that the beneficiary's subordinates' positions were not sufficiently complex to be considered professional positions. Counsel asserts that the director improperly based his decision on the petitioner's number of non-managerial employees in relation to its number of executive or managerial staff. Finally, counsel references the salaries the petitioner has paid to its employees, its volume of business, and the beneficiary's location on the petitioner's organizational chart and asserts that the director's conclusions are unsubstantiated.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). First, the petitioner vaguely refers, in part, to duties such as establishing business objectives and policies, planning and managing a budget, and supervising five professional employees. These statements are not comprehensive and paraphrase elements in the statutory definitions of executive and managerial capacity. See 101(a)(44)(A)(i), (ii) and 101(a)(44)(B)(ii) of the Act. Specifics are clearly an important indication of whether a beneficiary'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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Second, as the director observed, the petitioner's description of a portion of the beneficiary's duties is more indicative of an individual involved in sales and marketing. The beneficiary negotiates contracts, places production orders, and markets and sells the company's product through active participation in trade shows. The record contains evidence that the beneficiary signs invoices, regularly attends trades shows, and directly solicits sales from customers. These duties are those of a sales person. Moreover, the petitioner has not provided evidence that it employs any individuals in sales positions. Although the director did not articulate

the numerous examples of the beneficiary's "sales" duties, an objective review of the record substantiates the director's conclusion that the beneficiary spent a significant portion of his time selling the petitioner's product. In addition, the beneficiary monitors and analyzes information concerning the marketing of handcrafted products. This statement suggests that it is the beneficiary who performs the marketing analysis. 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).

Third, the beneficiary's duties of monitoring production operations and supervising logistical operations appear to encompass first-line supervisory duties. The petitioner has not provided evidence that individuals involved in performing quality checks, warehousing products, and distributing products would be required to perform tasks of such complexity that such positions could properly be identified as professional. 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. *See* section 101(a)(44)(A)(iv) of the Act.

Finally, and contrary to counsel's assertion, the record does not support the petitioner's statement that the beneficiary supervises five professionals. The record does not contain independent evidence that the marketing, administration, or accounting personnel are engaged in duties that contemplate knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction. *See Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In this matter, the petitioner does not provide a description of the beneficiary's subordinates' day-to-day duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Although the director could have better articulated the basis for his decision, the record is replete with evidence that the beneficiary's assignment is to primarily sell the petitioner's product, and apparently even design the petitioner's product, as well as provide some supervision of non-professional, non-supervisory, and non-managerial employees. The record does not support counsel's implicit assertion that salaries paid to employees, the petitioner's volume of business, and the beneficiary's location on the petitioner's organizational chart sufficiently demonstrate that the beneficiary serves in a managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *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). In this matter, the petitioner's description of the beneficiary's duties and the numerous documents submitted substantiate that the beneficiary's assignment is to primarily provide the petitioner's operational services.

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

The director observed that the wire transfer purportedly made to capitalize the petitioner showed an individual had originated the transfer. The director also noted that petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, contained information inconsistent with the petitioner's claimed subsidiary status. The director concluded that the petitioner had not provided sufficient evidence to establish qualifying foreign company ownership of the petitioner.

Counsel for the petitioner identified the individual on the wire transfer as the beneficiary's wife. The record also contains a confirmation of transaction from a foreign bank identifying the petitioner's claimed parent company and the individual identified as the beneficiary's wife as "applicant" on a transfer of funds to the petitioner. Counsel also provides on appeal certified copies of the petitioner's amended tax returns. The amended tax returns eliminate the inconsistencies the director observed in his decision. Counsel also provides letters from other sources indicating that the petitioner is a subsidiary of the beneficiary's foreign employer.

The AAO questions the credibility of tax returns amended years after the initial filings. Nevertheless, taken as a whole, the petitioner's evidence sufficiently documents a qualifying relationship exists between the U.S. and foreign employers. The director's decision will be withdrawn on the issue of the petitioner's qualifying relationship.

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 its burden in establishing the beneficiary's managerial or executive capacity.

ORDER: The appeal is dismissed.