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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

File: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 24 2002

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was approved by the Director, Vermont Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in 1997. The petitioner is engaged in the purchase and sale of computer components. It seeks classification of 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 initially approved the petition that was filed in March of 1999. Upon review of the record, the director determined that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director properly issued a preliminary notice of intent to revoke the petition on September 28, 2000. The director stated that a final decision would not be made for thirty days and indicated that the petitioner could submit any evidence that it felt would overcome the reasons for revocation. In a letter dated November 1, 2000 petitioner's counsel of record requested an extension of thirty days to November 30, 2000 to submit additional evidence to overcome the reasons for revocation. In a letter dated November 30, 2000 counsel for the petitioner stated that the petitioner had retained other counsel and requested that the Service allow additional time to obtain additional documentation. In a letter dated December 7, 2000, new counsel requested a 60-day extension to review the file and gather information requested by the Service on September 28, 2000. On December 26, 2000 counsel for the petitioner submitted his G-28 for file number A 77 708 290 requesting an extension of the beneficiary's L-1A immigration status while this I-140 petition was under review. On January 16, 2001 the Service revoked the petition noting that the petitioner had not provided any evidence to overcome the grounds of revocation. In a letter dated January 23, 2001 counsel for the petitioner indicated that he had never received a response regarding his request for additional time to submit documentation in response to the director's notice of intent to revoke. Counsel also submitted documentation in response to the director's September 28, 2000 notice of intent to revoke with the January 23, 2001 letter. Counsel requested that the Service reconsider its decision to revoke the approval of the petition or in the alternative the documents submitted were in support of the petitioner's appeal. The director determined that neither the petitioner nor the representative of record had signed the appeal. The director concluded that the appeal had not been properly filed and returned the file to the petitioner.

Current counsel for the petitioner submits a G-28 on April 9, 2001 along with the documentation previously submitted in the

January 23, 2001 response to the director's notice of intent to revoke the petition. The record indicates that the notice of revocation was mailed on January 16, 2001. As noted above, the Service rejected the appeal as not signed by the petitioner or an authorized representative of the petitioner. In an April 5, 2001 letter, Craig Meyerson, current counsel for the petitioner asserts that he submitted a fully executed Form G-28, with a cover letter on December 26, 2000. However upon review, the Form G-28 submitted by counsel on December 26, 2000 was submitted with I-129 and I-539 petitions to extend the immigration status of the beneficiary. The Form G-28 was not submitted in relation to the I-140 petition, the petition that is the subject of this appeal. The files relating to the I-129 and I-539 petitions are separate and apart from the I-140 petition.

Furthermore, 8 C.F.R. 103.3(a)(2)(v)(A)(2)(i) states:

> *General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

The director's rejection of the January 23, 2001 appeal was appropriate. However, 8 C.F.R. 103.3(a)(2)(v)(A)(2)(iii) provides guidance on the action to take when a Form G-28 is not submitted with an appeal as follows:

> *When favorable action not warranted.* If the reviewing official decides favorable action is not warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 directly to the AAU. The official shall also forward the appeal and the relating record of proceeding to the AAU. The appeal may be considered properly filed as of its original date if the attorney or representative submits a properly executed Form G-28 entitling that person to file the appeal.

We will consider the director's rejection of the appeal as not properly filed because of the lack of a properly executed Form G-28, notice to the petitioner that a Form G-28 must be filed. Although the director did not request the petitioner to submit the Form G-28 directly to the AAU, the petitioner did submit a properly executed Form G-28 on April 9, 2001 along with the documentation previously submitted on January 23, 2001. As such, we consider the appeal properly filed as of the original date of January 23, 2001.

Regarding counsel's statement in his January 23, 2001 letter that he was not provided an answer regarding his request for additional time to submit a response to the director's notice of intent to revoke we must point out that the Service is under no obligation to grant extensions of time to submit evidence. Of further note, in this case, the Service did not issue a final decision for almost four months after the issuance of the notice of intent to revoke. According to counsel's statements and despite not having submitted a Form G-28 in connection with this case, he assumed representation of the petitioner in November of 2000. The Service originally indicated that the petitioner had thirty days to respond to director's notice of revocation, instead the Service allowed an additional two and a half months after the due date for the petitioner to respond. The petitioner was put on notice of the intended revocation and was allowed a reasonable opportunity to provide evidence to overcome the deficiencies in the petition but did not provide it prior to the director's decision on January 16, 2001. As such, the additional documentation submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel asserts that the documentation submitted clearly demonstrates that the beneficiary has been and will be employed in a primarily managerial or executive capacity in the United States.

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):
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> * * *
>
> (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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

> (i) Required evidence. A petition for a multinational

executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary has been and will be 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.

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).

In a letter submitted with the initial petition, the petitioner described the beneficiary's duties as follows:

> In his position as President of the company [the beneficiary] is responsible for all [sic] formulating company policy, determining company goals and strategies, negotiating and execution of all legally-binding contracts and agreements as the legal representative of the company. [The beneficiary] has the absolute right to hire and fire employees and is responsible only to the Board of Directors of

[redacted]

[petitioner's parent company].

The petitioner also noted three major areas as the target of the beneficiary's policy formation including technical, marketing and service and support. Regarding the technical area, the petitioner indicated that it had decided to set up a web site. Regarding the marketing area, the petitioner noted that the beneficiary had instituted research into the development of sales teams and had ordered a commission system to be designed for the sales teams. Regarding the service and support area, the petitioner explained that the beneficiary had decided that service and customer support would be a top priority of the company.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the fiscal year beginning June 4, 1997 and ending May 31, 1998. The 1997-98 IRS Form 1120 revealed gross receipts in the amount of $1,206,647, compensation paid to officers in the amount of $12,500 and salaries paid in the amount of $17,000 for the year. The IRS Form 1120 for the 1997-98 year also showed commissions paid in the amount of $31,663. The petitioner also included its IRS Form W-2, Wage and Tax Statement for 1998 for eight individuals and an IRS Form 1099 Miscellaneous Income paid to one individual for the year 1998.

It is noted that the petitioner never clarified whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or 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.

In the notice of intent to revoke, the director requested additional evidence that the beneficiary had been and would be engaged in a primarily managerial or executive position, including a complete description for all of the petitioner's employees in the United States. The director also requested a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

As noted above, the petitioner did not submit a response to the director's notice of intent to revoke and the documentation submitted after the director's decision will not be considered on appeal.

On appeal, counsel asserts that the documentation submitted clearly demonstrates that the beneficiary has been and will be employed in a primarily managerial or executive capacity in the United States.

Upon review, counsel's assertion is not persuasive. 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). The petitioner's description of the job duties is not sufficient to warrant a finding of managerial or executive job duties. In the initial petition, the petitioner submitted a broad position description which vaguely refers, in part, to duties such as "formulating company policy, determining company goals and strategies, negotiating and execution of all legally-binding contracts," and having "the absolute right to hire and fire employees." These statements are too vague and general to convey an understanding of what the beneficiary will be doing on a daily basis. The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to the activities or whether the beneficiary is actually performing the activities.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed 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 an executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

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.