B4

U.S. Department of Justice

Immigration and Naturalization Service

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: WAC 02 033 51988 Office: CALIFORNIA SERVICE CENTER Date: FEB 06 2003

IN RE: Petitioner:
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)

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 California organization incorporated in February of 1995. It is engaged in the import, wholesale, and retail business. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner seeks 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 primarily 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 beneficiary's position is managerial and executive and that the petitioner is a qualifying organization.

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. 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.

The first issue in this proceeding is whether the beneficiary will be performing managerial or executive duties for the United States enterprise.

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 following job duties for the beneficiary's position:

> Will set company's objectives and policies consistent with the general directions of the parent company, daily instruct, counsel and supervise our department managers and departments (sales & office), and continually monitor (and amend when necessary), the performance of the departments and company to ensure the company's objectives are being made.

The director requested that the petitioner submit a more detailed description of the beneficiary's duties in the United States. The director requested that the petitioner indicate exactly whom the beneficiary directs including the subordinate employees' job titles and position descriptions. The director further requested the percentage of time the beneficiary spent in each of the listed duties.

In response the petitioner provided a description of the beneficiary's current duties for the petitioner in his position as the sales department manager and listed eight individuals under the beneficiary's supervision. The petitioner noted that the beneficiary spent seventy percent of his time with the sales side of the company and thirty percent of his time with the technical support side of the company. The petitioner than repeated the description previously provided for the beneficiary's proposed position of general manager.

The petitioner also provided the California Form DE-6, Quarterly Wage and Withholding Report for the pertinent quarter ending December 31, 2001. The California Form DE-6 reflected seven employees including the beneficiary. The petitioner also provided its organizational chart depicting a general manager, a controller, a sales and marketing manager, a division manager, and a technical support person. The chart also depicted four sales representatives and a service technician but the chart did not indicate if these positions were filled. When comparing the organizational chart and the California DE-6 Form for the quarter ending December 31, 2001, it appears that two individuals on the California From DE-6 could have been employed in one of the five positions that were unnamed on the organizational chart.

The director determined that the petitioner's job description for the beneficiary's proposed position was vague and general in nature. The director then speculated that the petitioner did not need an executive because it was a small company and that the petitioner's business did not require or have a reasonable need for an executive. The director also determined that the

beneficiary would be a first-line supervisor of non-professional employees. The director further determined that the petitioner had not established that the beneficiary managed or directed a function of the organization.

On appeal, counsel asserts that the beneficiary's position is clearly managerial and that the beneficiary is performing supervisory rather than routine operational activities. Counsel also asserts that the position is executive in nature.

Counsel's assertion that the beneficiary's position is both managerial and executive in nature is without merit. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). 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 has not provided a comprehensive description of the beneficiary's job duties. The petitioner initially submitted a broad position description for the beneficiary that primarily paraphrased elements of the executive and managerial definitions without conveying an understanding of the beneficiary's actual day-to-day duties.

The petitioner's response to the director's request for evidence focussed on the beneficiary's current duties for the petitioner rather than the duties pertinent to the beneficiary's proposed position. Although, the director's request for more detailed information did not specifically reference the "proposed position" for the petitioner it is the proposed position that must be managerial or executive in nature for the beneficiary to be eligible for this classification. The plain language of the statutory definition of both managerial and executive capacity requires an assignment within an organization in which the employee primarily carries out each element of the definition. If the petitioner is requesting consideration for the beneficiary as either a manager or an executive, the petitioner must provide a comprehensive description of the beneficiary's duties for that position. The petitioner has failed to provide such a description. Although the director improperly speculated as to the requirements of the petitioner's business for an executive, the petitioner has not provided sufficient evidence that the beneficiary will primarily direct the management of the organization. Relying on the beneficiary's title and a paraphrase of section 101(a)(44)(B)(ii) does not establish that the beneficiary's position will be executive in nature.

The petitioner also has not established that the beneficiary's position will be managerial in nature. The petitioner and counsel note that the petitioner employed seven individuals at the time the petition was filed. The director determined that the petitioner had only established the employment of five individuals based on the organizational chart submitted by the petitioner. We

find that the California Form DE-6 revealing the employment of seven individuals to be more probative than the petitioner's organizational chart. However, the petitioner has not provided position descriptions for any of the individuals listed on the organizational chart and on the California Form DE-6. It is not possible to determine based solely on the California DE-6 even if taken in conjunction with the organizational chart that any of the positions subordinate to the beneficiary are professional, managerial or supervisory in nature. 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). The Service cannot conclude that the beneficiary manages the organization, supervises and controls the work of other supervisory, professional, or managerial employees, has the authority to hire and fire or recommend these and other personnel actions, and also exercises discretion over the day-to-day operations over which the employee has authority. The record simply does not support such a conclusion.

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 in the proposed position 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. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. 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 executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been or will be employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioner and the claimed affiliated company.

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 petitioner has provided inconsistent information regarding its ownership and control. The petitioner's Articles of Incorporation filed February 16, 1995 indicate that it was authorized to issue 120,000 shares. The petitioner submitted its share certificate number one on March 20, 1995, issuing 120,000 shares to Partner Tech Corporation. The petitioner also submitted its share certificate number three dated January 2, 2000 issuing 120,000 shares to P & S Investment Holding Company Ltd. On February 19, 2001 the petitioner amended its Articles of Incorporation to authorize the issuance of 1,000,000 shares. The petitioner submitted its share certificate number four dated February 20, 2001 issuing 280,000 shares to P & S Investment Holding. The petitioner did not submit its share certificate number two. The petitioner also did not provide evidence that share certificate numbers one and three were cancelled or that the shareholders transferred the shares named therein to other entities.

The petitioner submitted its bank statements showing a wire transfer dated May 25, 1995 from Partner Tech Corp. in the amount of $4,500 and a wire transfer dated October 24, 1995 from Partner Tech Corp. in the amount of $60,000. The petitioner also submitted documentation of a remittance from P & S Investment Holding Company Ltd. to the petitioner in the amount of $280,000. This remittance documentation does not bear a legible date. The petitioner submitted on appeal a copy of its bank statement showing an incoming wire from Partner Tech Corp. in the amount of $20,000 dated March 6, 1995. The petitioner's accountant stated that an additional $35,000 was converted from prepayments to acquire the petitioner's capital stock. The accountant does not further describe the prepayments to indicate the origination of the prepayments.

The petitioner has not provided sufficient consistent documentation to establish that the petitioner is owned and

controlled by the Partner Tech Corporation or its related subsidiary group. The Service declines to speculate regarding the missing stock certificate, the prepayment remittance(s), or the indiscriminate method of allocating shares amongst the petitioner's alleged direct or indirect parent(s). The petitioner has not provided sufficient evidence on appeal to overcome the director's determination on this issue.

Beyond the decision of the director, the petitioner has not established that the beneficiary was performing managerial or executive duties in his position with the claimed overseas entity. On this issue, the description of the beneficiary's duties for the foreign entity and the foreign entity's organizational chart do not sufficiently establish that the beneficiary was performing in a managerial or executive capacity. As the petition is dismissed on the grounds stated above, this issue is not examined further.

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, that burden has not been met.

ORDER: The appeal is dismissed.