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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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Washington, D.C. 20536



File: EAC 01 040 53810 Office: VERMONT SERVICE CENTER

Date: FEB 06 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:



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, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an organization incorporated in January of 1998. It is engaged in the import and export business. It seeks to employ the beneficiary as its president. 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 petitioner.

On appeal, counsel asserts that the director failed to consider all the evidence submitted, failed to consider the beneficiary's responsibilities for an overseas staff, and failed to consider that the beneficiary qualifies as a functional manager.

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.

The 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 described the beneficiary's duties for the United States petitioner as follows:

His responsibilities will include analyzing markets in the USA for the products and merchandize that the Company imports from India and developing marketing and sales strategies. He will also work on developing long-term business plans including the design and implementation of a nationwide sales network. He will act as a liaison to managers and executives of key customers. As a member of the Executive Board of Directors of the parent corporation, he will participate in managerial and executive meetings with senior managers at [the petitioner's parent company] to delineate corporate goals and objectives and improve business communications between the two entities. He will work in a highly independent manner and will require minimal supervision. He has been granted the authority to hire, promote and fire staff as needed to manage and direct the business operations of [the petitioner]. He will also exercise complete discretion and independent judgment in rendering final management decisions pertaining to [the petitioner]. . . . [H]e is the highest-ranking manager of the Company.

The petitioner also indicated that it used independent contractors and had hired in-house employees to manage the business functions, including an administrative assistant and four sales representatives. The petitioner also included copies of four Internal Revenue Service (IRS) Forms 1099, Miscellaneous Income statements, two IRS W-2, Wage and Tax Statements, and its Form 1120, U.S. Corporation Income Tax Return, all for the year 1999.

The director requested additional documentation to establish that the beneficiary would be employed in an executive or managerial position in the United States. The director specifically requested a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis. The director also requested the number of the petitioner's employees, the duties performed by the employees, and as well as the management and personnel structures of the petitioner.

Through a letter signed by the managing director of the petitioner's claimed foreign parent, the petitioner stated the

beneficiary's duties as follows:

[The beneficiary] devotes approximately 80% of his time analyzing market and business opportunities, formulating business and sales strategies, implementing systems to manage and control growth, developing and overseeing budgets, and developing a network of support services through the use of outside vendors.

The response continued the job description as follows:

[T]he beneficiary's present role for U.S. operations is that of a "functional manager" i.e. directing and implementing key functions that will lead to the long-term survival, growth and profitability of the Company. His role regarding the office personnel at the [claimed parent company] continues to be that of a "supervisory manager."

The petitioner also provided its IRS Form 1120 for the year 2000. The Form 1120 revealed gross receipts in the amount of \$1,440,039, compensation of the beneficiary as an officer in the amount of \$24,000, salaries paid in the amount of \$12,000, commissions paid in the amount of \$68,345, and taxable net income of \$24,958.

The director determined that the record did not verify the petitioner's claimed number of employees. The director stated that considering the size of the petitioner and the claimed number of employees, it did not appear possible that the beneficiary would spend a majority of his time in a managerial or executive position. The director concluded that the beneficiary would not be employed in either a managerial or an executive capacity.

On appeal, counsel for the petitioner asserts that the director failed to consider all the evidence submitted. Counsel also provides copies of the petitioner's Forms 1099 issued to three individuals and the petitioner's Forms W-2 issued to the beneficiary and one other individual. Counsel further asserts that the petitioner's initial letter in support of the petition noted that it had hired an administrative assistant and four sales representatives. Counsel concludes that the number of employees and the nature of their positions have been identified, noting that the number of sales representatives has been reduced from four to three during the relevant time period. Counsel also asserts that the director failed to consider the beneficiary's responsibilities relating to an overseas staff when determining the size and professional nature of the staff supervised by the beneficiary. Finally counsel asserts that the director failed to consider that the beneficiary qualifies as a functional manager and that the director improperly based his decision solely upon the staffing of the United States company.

Counsel's assertions are 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 beneficiary's job duties indicates that the beneficiary will spend his time in the United States researching market conditions, developing sales strategies, developing and overseeing budgets, implementing systems to manage and control growth, and developing a network of support services through the use of outside vendors. The Service is unable to determine from these broadly phrased statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

Upon review of the record before the director, the director had only the general descriptions provided by the petitioner and the petitioner's statement that it used independent contractors and had hired in-house employees to manage the business functions, including an administrative assistant and four sales representatives. The director did not have the petitioner's IRS Forms W-2 for the pertinent time frame of 2000 nor did the director have the petitioner's IRS Forms 1099 for the year 2000. The reluctance of the director to rely exclusively on the petitioner's statement that it had hired in-house employees to manage the business functions and had four sales representatives is validated by the petitioner's response on appeal. The response notes that it did not have four sales representatives in 2000 after all but only had three sales representatives and thus could only provide three IRS Forms 1099. Although the director did not specifically request IRS Forms or independent evidence of the petitioner's staff, the director appears to have fully considered the information before him.

The additional IRS Forms provided by the counsel on appeal are not sufficient to overcome the director's determination on this issue. The petitioner has provided evidence that it employs sales representatives on a commission basis. The petitioner also has presented evidence of two employees, the beneficiary and apparently an administrative assistant. The petitioner does not provide a detailed description of the second employee's duties. The Service is left to conclude that the beneficiary will be the person performing the marketing research, developing sales strategies, developing budgets, and implementing systems to manage and control growth. The record is not sufficient to support a claim that a majority of the beneficiary's duties relate to operational or policy management, and not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

Counsel's assertion that the beneficiary's responsibilities relating to an overseas staff also establish the beneficiary's eligibility as a manager or an executive for the United States petitioner is not persuasive. The statutory definitions of

executive and managerial capacity refer to an assignment within an organization in which the employee either manages the organization or directs the management of the organization. Section 101(a)(28) of the Act defines "organization" as follows: "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects." The statutory definition of an organization would not reasonably include a foreign corporation that is an entity separate and distinct from the petitioning organization. The petitioner has not provided any evidence to establish that the United States entity and the foreign company are either permanently or temporarily associated through ownership, contract, or other legal means. Accordingly, the beneficiary's claimed managerial or executive duties that relate to the employees of the foreign corporation may not be considered for purposes of this immigrant visa petition.

Counsel's assertion that the beneficiary qualifies as a functional manager is also not persuasive. Neither counsel nor the petitioner has fully described the function the beneficiary manages. The implementation of various duties relating to the operational policies of the petitioner is more indicative of an individual performing various operational functions rather than managing them. 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).

Although the director based his decision partially on the size of the enterprise and the number of staff, it does not appear the director took into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner apparently was a two and a half-year-old import and export company. The firm employed the beneficiary as president, a second employee and used three independent sales contractors. The petitioner has not provided comprehensive descriptions of the employee's or the contractors' job duties. The Service is left to speculate on the tasks to be performed by the individuals working with or for the petitioner. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or

lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

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 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 will manage 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 employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed parent company. The record does not reveal any documentary evidence as to the incorporation of the petitioner other than the designation "Inc." at the end of its name and the assertion to the IRS that it is a corporation. The record does not contain any stock certificates or other independent information to establish that a foreign entity is the parent company of the petitioner. 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). Moreover, contrary to the assertions contained in the record that a foreign entity owns the petitioner, the IRS Form 1120 for the year 2000 reveals at Schedule E and K that the beneficiary is the 100 percent owner of the petitioner. For this additional reason the petition may not be approved.

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.