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U.S. Department of Justice
Immigration and Naturalization Service

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



File:



Office: NEBRASKA 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, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in the embroidery and silk screening business. It seeks to employ the beneficiary as its president. Accordingly, it 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 work in a primarily managerial or executive capacity for the United States company. The director also determined that the petitioner had not established a qualifying relationship with a foreign entity.

On appeal, counsel for the petitioner disputes the Service's determinations that there is no qualifying relationship and that the beneficiary is not acting in a managerial or executive capacity.

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 petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

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 current duties as an L-1A beneficiary indicating that the current duties would continue for the United States entity as follows:

He is the President of the petitioner. He is charged with hiring, firing, training, personnel matters, negotiating contracts, marketing, finances, and general day-to-day and long term [sic] management for that region.

He performs most executive functions, including setting and implementing company goals and policies. He is the President, director and sole shareholder. He reports to no one.

The director requested additional details of the proposed position.

In response the petitioner provided a general job description essentially paraphrasing the elements of the criteria set forth in the statutory definition of managerial and executive capacity. The petitioner also provided a more detailed description of the beneficiary's duties as follows:

1. Long-term planning and direction (including targets, plans, capital expenditures, setting procedures, etc.)
2. Meeting with professionals and government agencies for company purposes. [sic]
3. Banking and finance
4. Giving direction to general manager and other workers
5. Negotiates with customers and potential customers
6. Developing marketing strategies and product development
7. Administration of personnel matters
8. Assures customer satisfaction i.e., liaises [sic] with customers and gives direction and makes decisions to solve problems and improve product and service. [sic]
9. Selects and negotiates with suppliers
10. Coordinates efforts of company to effectuate product development and improvements, i.e., establish training programs, obtain and distribute technical information, establish polices and procedures, monitors results.

The director determined that the petitioner's description of the beneficiary's duties failed to establish that the beneficiary was performing duties that are primarily executive or managerial in nature. The director further determined that the record failed to establish that the petitioner employed professional staff that would relieve the beneficiary from performing the day-to-day operations of the business.

On appeal, counsel for the petitioner re-states the previously provided job descriptions for the beneficiary. Counsel asserts that the Service based its decision on irrelevant and improper grounds. Counsel asserts that the law does not require that the beneficiary have a large staff and that since the beneficiary is the most senior employee with ultimate control of the entire company his duties are both managerial and executive in nature. Counsel cites several unpublished decisions to support his assertions.

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). In the initial petition, the petitioner provided a general description of the proposed duties of the beneficiary. In response to the director's request for evidence the petitioner again submitted a general position description that referred, in part, to duties such as "long-term planning and direction," and "banking and finance," and "meeting with professionals and government agencies," and "negotiate[ing] with customers," and "assure[ing] customer satisfaction." The Service is unable to determine from these general phrases whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

In addition, portions of the petitioner's description are more indicative of an individual performing basic operations of the company. For example, the petitioner indicates that the beneficiary selects and negotiates with suppliers, establishes training programs, obtains and distributes technical information and monitors results. 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). The job duties described by the petitioner are too vague and general in nature to convey an understanding of exactly what the beneficiary will be doing on a daily basis. It is not sufficient to rely on the beneficiary's title of president and the fact that he is the sole shareholder to presume that the beneficiary will be primarily acting in a managerial or executive capacity rather than primarily performing the basic requirements to operate the petitioner.

Further, the petitioner and counsel's paraphrasing of the elements

of the statutory definition of managerial and executive capacity and their conclusion that the beneficiary performs each of these elements does not contribute to a finding that the beneficiary is a manager or an executive. 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). In the case at hand, the record is deficient in providing a comprehensive description of the beneficiary's daily duties and how these daily duties relate to the beneficiary acting in a managerial or executive capacity.

Counsel's assertion that a "beneficiary" does not need a large, professional staff to be considered a manager or executive is unclear. If counsel is maintaining that the reasonable needs of the enterprise must be considered when the Service's decision considers the size of the petitioner in relation to the beneficiary's duties and responsibilities, counsel is correct. See Section 101(a)(44)(C) of the Act. However, it does not appear that the director's decision is based on the size of the petitioner, but rather on the nature of the beneficiary's duties and the lack of information indicating that other individuals were performing the basic services of the petitioner thereby relieving the beneficiary to act primarily in a managerial or executive capacity. As noted above, the petitioner has not provided a comprehensive description of the beneficiary's duties and responsibilities and much of the description is more indicative of an individual performing services 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.

Counsel's citation of unpublished decisions to support his assertions and conclusions that the beneficiary's position in the company must connote a managerial or executive position is not warranted. Counsel has not furnished sufficient information to establish that the facts of the instant petition are analogous to those in the cases cited. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

Finally, the petitioner has not provided a comprehensive job description that describes how the beneficiary will meet all four criteria set out in either the statutory definition of executive or the statutory definition of manager. The petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Upon review, the petitioner has not provided sufficient evidence

to conclude that the beneficiary will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are general and fail to sufficiently describe his actual day-to-day duties. The record does not adequately 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.

The second issue in this proceeding is whether the petitioner has established that it is affiliated with a foreign entity.

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 beneficiary in this case is the sole shareholder of the petitioner. In addition, the beneficiary owns 51 percent of the claimed related Canadian entity. It is clear that the beneficiary owns and controls the petitioner. It is also clear that the beneficiary is the majority shareholder of the claimed foreign entity and controls the foreign entity based on the majority ownership.

Counsel asserts that the regulations contemplate ownership of a controlling ownership of the petitioner and the foreign entity,

not identical or 100 percent ownership. We disagree. The language of the regulation is clear. The Canadian entity and the United States petitioner are not in a parent-subsidiary relationship based on the above definition. Neither the Canadian company nor the United States petitioner own a portion of the other thereby establishing such a relationship. The petitioner must establish therefore that the Canadian entity and the United States petitioner have an "affiliate" relationship. Subsection A of the definition of affiliate found in 8 C.F.R. 204.5(j)(2) requires that both of the companies are owned and controlled by the same parent or individual. This subsection specifically excludes plural ownership of the two entities. If either of the two companies has plural ownership, the petitioner must look to the definition supplied in subsection B of the affiliate definition found in 8 C.F.R. 204.5(j)(2). This subsection requires that the affiliated companies be owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion in each of the companies. The Service cannot extend subsection A of the affiliate definition to the situation at hand wherein only one of the companies asserting an affiliate relationship has a sole shareholder and the other company is owned by more than one shareholder. To do so would obviate the necessity of subsection B of the affiliate definition. The requirement that both entities must be owned and controlled by the same group of individuals in approximately the same proportion would be subsumed into subsection A without the restriction of proportionality of ownership. The Service looks to the plain meaning of the language in subsection A of the affiliate definition that requires singular ownership of both entities. When multiple owners are involved in two companies claiming an affiliate relationship, the Service looks to the plain language of subsection B of the affiliate definition that requires the multiple owners to own both entities in the same approximate proportions. Here, the Canadian and United States entities are not affiliates because they are not owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. The United States entity has one owner; the Canadian entity is owned by more than one person.

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 sustained that burden.

ORDER: The appeal is dismissed.