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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

[redacted]

File: EAC 01 240 56521 Office: VERMONT SERVICE CENTER Date: FEB 11 2003

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]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision 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.

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 that 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 that 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an organization incorporated in New Jersey in November 1999. The petitioner imports and sells furniture. 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 primarily executive capacity or that the beneficiary would be supervising a staff of professionals.

On appeal, counsel for the petitioner asserts that the petitioner provided sufficient independent evidence to demonstrate that the beneficiary is performing a managerial and executive function.

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 petitioner has established that the beneficiary will be employed in a primarily 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-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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-
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> 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 submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 2000. The IRS Form 1120 revealed gross receipts of $166,693, salaries paid in the amount of $63,453, and net income of $41,548. The petitioner also submitted copies of the notices for the beneficiary's previously approved L-1A classification.

The director requested a comprehensive description of the beneficiary's position for the petitioner as well as a list of the petitioner's employees and their duties, an organizational chart, and copies of the petitioner's IRS Forms 941, Employer's Wage and Quarterly Tax Return.

In response, the petitioner provided a description of the beneficiary's decisions and plans for setting up the import, retail, and wholesale business. The petitioner indicated that it was the beneficiary who implemented the plans. The petitioner also provided the following description of the beneficiary's duties:

> Performs executive functions including the following; direct management of organization, establish goals, polices and set standards, exercising unlimited discretionary decision making powers (11 hours). Planning/developing, establishing policies and objectives of our organization (7 hours). Have discussions with company officers that plan business objectives, develop organizational policies to co-ordinate functions and operations between divisions and departments, establish responsibilities and procedures for attaining company objectives (8 hours). Study activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plan in accordance with current conditions (8 hours). Judge performance of executives including the Deputy General Manager, who are the subordinate supervisors of President, for compliance with company policies and objectives and evaluate their contributions in attaining objectives of the company (4 hours). Plan and develop industrial, labor and public relations with customers, employees, stockholders and public (1 hour). Preside over board of director meetings (1 hour).

The petitioner also identified four other employees in the positions of deputy general manager, divisional manager of retail sales and stores, and two sales representatives. The petitioner also referenced one individual working on a commission basis. The petitioner indicated that outside firms handled its secretarial, payroll, accounting, packing, and shipping duties. The petitioner also provided its New Jersey Form N-78, Employer's Quarterly State of Wages Paid to Each Employee for the quarter ending September 30, 2001. The New Jersey Form N-78 confirmed the employment of five individuals for this quarter, the quarter in which the petition was filed. The petitioner also provided several invoices and receipts to document its use of payroll, packing, and shipping services. The petitioner further provided its organizational chart that depicted several planned positions in addition to the five employees employed at the time of the filing of the petition.

The director determined from the record that the petitioner's payment of $63,000 in salaries for the year 2000 could not support a conclusion that the petitioner employed a bona fide executive or manager.

The petitioner filed a motion to reopen and reconsider the decision and the director granted the motion. The petitioner stated that the petitioner had employed only one individual, the beneficiary, through the end of December 2000. The petitioner indicated that it began the process of hiring additional employees in January of 2001 after the arrival of the first consignment of furniture. The petitioner further indicated that, at the time the petition was filed in July of 2001, it had hired a deputy general manager, a divisional manager, and two salespersons. The director determined that the salaries paid did not evidence that the beneficiary would be overseeing a professional staff. The director concluded that the petitioner's information on motion did not overcome his decision.

On appeal, counsel for the petitioner asserts that the Service misunderstood, misconstrued, and failed to peruse the petitioner's documentary evidence. Counsel asserts that the petitioner has provided sufficient documentation to demonstrate that the beneficiary is providing a managerial and executive function for the petitioner. Counsel requests that the Administrative Appeals Office take judicial notice that the beneficiary was approved for L-1A status in February of 2000 and that the L-1A status was extended for a further two-year period in February of 2001.

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 has submitted a broad description for the beneficiary's position that essentially paraphrases certain elements of the definition of "executive capacity" without conveying an understanding of the beneficiary's day-to-day duties. *See* section 101(a)(44)(B)(i), (ii), and (iii)

of the Act. The position descriptions for the deputy general manager and the divisional manager are likewise general in nature.

The record does not contain sufficient information to determine that the beneficiary as president, the deputy general manager, the divisional manager, and two sales representatives would plausibly meet the needs of the petitioner without the beneficiary and her two "managers" participating in the day-to-day execution of non-qualifying duties. The record does not contain a sufficient comprehensive description of the actual day-to-day duties of the beneficiary to conclude that her primary duties are executive or managerial in nature. The record is replete with information showing the beneficiary's participation in setting up the company in the year 2000. The record however, does not contain the necessary information demonstrating that once the company was set up that the beneficiary's duties transformed to those of a manager or executive primarily performing in an executive or managerial capacity rather than providing the necessary operational services to continue the petitioner's existence. 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).

Counsel's reliance on past approvals resulting in L-1A non-immigrant status for this beneficiary is misguided. The director's decision does not indicate whether he reviewed the prior approvals of the other non-immigrant petitions. The record of proceeding does not contain copies of the documentary evidence resulting in the approval of the L-1A visa petitions. However, if the previous non-immigrant petitions were approved based on the same general descriptions as contained in the current record, the approval would constitute clear and gross error on the part of the Service. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the requirements for the approval of an immigrant petition for this classification are exacting. The petitioner must establish that it has been doing business for one year prior to the filing of the petition. As will be discussed below, the petitioner has not fulfilled this very basic requirement.

In sum, 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 her 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 it has been doing business for one year prior to the filing of the petition. 8 C.F.R. 204.5(j)(3)(i)(D) requires the petitioner to submit evidence demonstrating that the prospective United States employer has been doing business for at least one year. 8 C.F.R. 204.5(j)(2) states in pertinent part:

> *Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petition was filed in July 2001. This would require that the petitioner have been engaged in the regular, systematic, and continuous provision of goods and services by early July 2000. As stated by the petitioner, it did not receive its first shipment of goods until December 2000. It did not begin selling goods and did not need employees, save for the beneficiary, until January of 2001. The documentation in the record almost all relates to the beneficiary's setting up of the business in the United States. For this particular classification, it is imperative that the petitioner demonstrate that it has been doing business for one year and, thus, can support and will continue to be able to support a multinational manager or executive. The petitioner has failed to fulfill this requirement. 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.