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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

PUBLIC COPY

[redacted]

FEB 11 2003

File: EAC 01 105 54317 Office: VERMONT SERVICE CENTER Date:

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 York in April of 1999. The petitioner is engaged in import, export, trading, and distribution primarily of automobile tires. It seeks to employ the beneficiary as its general manager. 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 managerial or executive capacity.

On appeal, counsel for the petitioner contends that the beneficiary's duties are consistent with the Service's interpretation of "managerial capacity" and that the petitioner has presented documentary evidence to support this contention.

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;
>
> 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
>
> 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 described the beneficiary's current duties for the company and stated that the beneficiary would continue to work out of two offices in the United States. The petitioner stated that the beneficiary would work primarily in the Miami, Florida office and would have final supervisory control of that office. The petitioner also stated that the beneficiary would "continue to be empowered to direct the organization including the hiring and placement of the personnel, terms of employment, physical lay out of our offices and coordinating our decision making with parent office." The petitioner further stated that the beneficiary would "devote virtually all of his time to the management of the U.S. business."

The director requested a complete description for all the petitioner's employees in the United States with a breakdown of the number of hours devoted to the employee's job duties.

In response, the petitioner provided the following description of the beneficiary's job duties:

> Being completely responsible for the U.S. operations as a cost center, one of the primary tasks of [the beneficiary] is to source the products at a right price and market them with sufficient margins for the center to be profitable. For the procurement, [the beneficiary] uses his long established contacts and matured negotiation skills; he is regularly supported by the office in Singapore; he co-ordinates for [sic] establishing letters of credit and payment procedures for the suppliers.
>
> With regards to marketing, [the beneficiary] not only markets directly to customers but also manages the team comprised of [sic] sales manager and agents. [The beneficiary] is involved in rigorous credit evaluation of new customers and has discretionary authority over the transactions and to represent the organization as a whole. He travels to develop suppliers and to meet existing customers.

The petitioner also indicated that the beneficiary spent approximately 20 hours on marketing and supervision of marketing activities, product procurement and pricing, and reviewing reports

and meeting with the president in the New York office. The petitioner indicated further that the beneficiary spent approximately 10 hours setting purchasing strategy, establishing information systems, meeting with banks, and establishing letters of credit, and logistical and oversight duties relating to the functioning of the Miami office. The petitioner indicated that the beneficiary spent the remaining 10 hours of the workweek on corporate planning, acquisitions, business development, organization of financial and productivity reports, and personnel management.

The petitioner also provided brief job descriptions for the president of the company indicating that the president worked approximately 20 hours per week. The petitioner stated that the president spent that time meeting with the beneficiary, reviewing financial reports and interacting with the parent company. The petitioner also provided a job description for the assistant sales manager who spent the majority of his workweek making sales calls, placing orders, and making sales presentations. The petitioner also stated that it employed an accountant and bookkeeper on a part-time basis.

The petitioner further provided a copy of its Internal Revenue Service (IRS) Form 941 for the quarter ending March 2001. The IRS Form 941 depicted the employment of three individuals, the beneficiary, the part-time accountant, and the part-time bookkeeper. The employment of the assistant sales manager was not reflected on the IRS Form 941 for this quarter, the quarter in which the petition was filed.

The director determined from the record that the beneficiary's duties were operational and not managerial or executive in nature. The director also determined that the previous approval of the L-1A non-immigrant status was in error.

On appeal, counsel for the petitioner asserts that the beneficiary's primary duties "are the management and distribution of the parent company's products, diversification as well as financial and inventory management." Counsel also asserts that the beneficiary has "direct control of the marketing and financial functions" of the petitioner. Counsel also cites several cases, both published and unpublished in support of his claim that the size and staffing level of the petitioner should be reviewed in relation to the reasonable needs of the petitioner. Counsel indicates that the petitioner utilizes e-commerce, obviating the need for secretarial services.

Counsel also provides the first two pages of the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return for the year 2001. The IRS Form 1120 reflects $4,053,547 in gross receipts, compensation of officers in the amount of $74,048, salaries paid of $15,565, and net income of $34,035. Counsel also provides the Forms W-2, Wage and Tax Statements, issued by the petitioner in

2001. One Form W-2 reflects payment to the beneficiary of $60,000 and another Form W-2 reflects payment to the part-time president of $14,047.69. Salaries paid to the bookkeeper and accountant total $3,898.32 and payment to the assistant sales manager is reflected as $11,666.69. Counsel further provides two IRS Forms 1099 Miscellaneous Income Statements reflecting payment of $6,668 to two individuals.

Counsel's assertions and the information presented on appeal 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 initial petition provided a broad position description for the beneficiary's position essentially stating that the beneficiary would be primarily in charge of the Miami office and would manage the United States business. It is not possible to tell from the information provided what the beneficiary's daily duties would be. The petitioner's response to the director's request for evidence indicated that the beneficiary would be the individual responsible for marketing the product, negotiating prices, establishing lines of credit, and developing suppliers. It appears from this description that the beneficiary provides the petitioner's goods and services to customers. 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 petitioner's description of the beneficiary's duties is more indicative of an individual performing the basic operational task of marketing the petitioner's product rather than a description of duties relating primarily to operational or policy management.

In addition, counsel and the petitioner assert that the beneficiary also manages a team of sales personnel; however, the documentary evidence does not support this assertion. 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). At the time of filing the petition, the petitioner paid only three individuals: the beneficiary, a bookkeeper, and an accountant. The beneficiary at that time, thus, appears to be the individual primarily responsible for the generation of the petitioner's gross sales.

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 fail to convey an adequate understanding of the day-to-day duties of the beneficiary. The descriptions of the beneficiary's duties when reviewed with the documentary evidence are more indicative of an individual primarily performing the basic operations of the

petitioner. The descriptions of the duties to be performed by the beneficiary do 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 employed in either a primarily managerial or executive capacity.

As counsel notes, section 101(a)(44)(C) of the Act requires that the Service take into account the reasonable needs of the organization in light of the overall purpose and stage of development of the organization, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. Counsel asserts that the petitioner's type of business relies primarily on e-commerce and, thus, does not require administrative or secretarial personnel. Even if this is the case, the petitioner still relies on someone to sell its product. The petitioner has not established that, at the time of filing, it employed sufficient personnel to relieve the beneficiary from performing the sales and marketing tasks of the petitioner. Just because the beneficiary is able to utilize e-commerce to sell the petitioner's product does not make the beneficiary a manager or executive. The petitioner has not provided sufficient evidence to establish that the beneficiary is primarily planning, organizing, directing, and controlling the organization's major functions rather than primarily acting as the petitioner's agent or the petitioner's parent company's agent in the United States. Further, the petitioner's staffing levels serve 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.

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.