PUBLIC COPY
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

FEB 14 2003

File: [redacted] Office: CALIFORNIA 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]

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 preference visa petition was denied by the Director, California 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 Nevada in June of 1995. The petitioner is engaged in purchasing and developing real estate. It seeks to employ the beneficiary as its executive vice-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 managerial or executive capacity.

On appeal, counsel for the petitioner contends that the beneficiary is an executive who manages both individuals and a major function of the company.

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 petitioner was incorporated in June of 1995 and is a wholly-owned subsidiary of a corporation organized pursuant to the laws of the State of New York. The New York company is a wholly-owned subsidiary of a corporation established pursuant to the laws of Israel. The petitioner in June of 1995 entered into an agreement with an unrelated party to establish a joint venture for the purpose of purchasing and developing property in the Las Vegas area. The petitioner and the third party formed a limited liability company to carry out the development of properties in the Las Vegas area. The petitioner provided two agreements, the joint venture agreement and the operating agreement for the limited liability company. The agreements set out the rights and obligations of the petitioner and the third party.

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-
>
> 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 submitted a letter outlining the beneficiary's duties as follows:

> Specifically the duties of the Executive Vice President are to formulate business development strategy; hire, fire, and review staff and their performance; interview, direct and manage all subcontractors, including area managers and employees; act as a liaison between city officials and construction companies to obtain necessary permits and licenses; use discretionary authority over approval of plans, designs, and engineering requirements; participate in litigation regarding joint venture including investigate chain of events; supervise the development of Sedona Three in the Pueblo at Summerlin and other projects; liaison with New York and Israeli branches; oversee research and feasibility studies; oversee compliance with administrative policies, procedures, rules and government regulations; develop and approve marketing once construction is completed; and collect reports and present compilation to Board of Directors and to parent company.

The I-140 Form indicated that the petitioner employed one person. The petitioner provided a copy of the joint venture agreement entered into with a third party. The joint venture agreement dated June 28, 1995 included a section on the management of the joint venture. The agreement specified that two individuals, neither one the beneficiary, would be responsible for the day-to-day management of the joint venture's property, including preparing the plans, securing permits, construction, and

disposition of the improved property. The two individuals appear to be employed by the unrelated joint venturer and not the petitioner. The agreement limited the petitioner's duties to oversight and approval of the actions of the two individuals identified as managers. The petitioner also provided a copy of the limited liability company agreement dated August 14, 1995. The authority and duties of the two members of the limited liability company were also outlined. This agreement also identified two individuals, neither one the beneficiary, to be responsible for the day-to-day management of the company.

The director requested additional information on the beneficiary's proposed duties.

In response, counsel for the petitioner stated that at the time the petition was filed the beneficiary was the only employee of the petitioner. Counsel indicated that the remaining workers were all subcontractors. Counsel also noted that since the filing of the petition the petitioner had hired a secretary and an engineer. Counsel also provided a proposed personnel chart depicting several new positions that the petitioner planned to fill in the future. Counsel also re-stated the position description previously provided with the petition.

The director determined from the record that the petitioner had not established that the beneficiary would be working in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner has contracted with several engineering, surveying, and construction companies to construct apartments, homes, and developments. Counsel again references the proposed hiring of additional employees by the petitioner and notes that the petitioner continues to rely on independent contractors to perform the actual building of the properties. Counsel asserts the beneficiary's duties encompass the supervision of all of the contractors. Counsel also asserts that the beneficiary supervises the essential function of oversight of the building of housing developments noting that the beneficiary does not make the product the company produces (housing) but supervises the function of the construction itself.

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 submitted a broad position description that appears to conflict with the petitioner's responsibilities as outlined in the joint venture agreement and the limited liability company agreement. It is not possible to determine from the record how the beneficiary's position differs from the two individuals identified as the "managers" of the joint venture and limited liability company. It is incumbent upon the petitioner to resolve any inconsistencies in

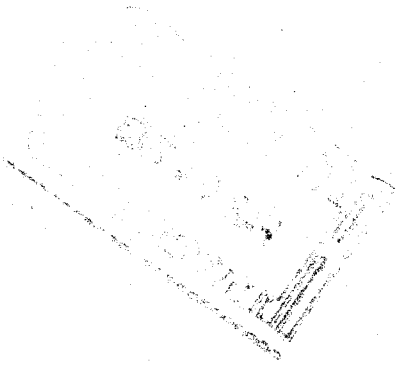
the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). It is not possible to conclude from the conflicting information provided whether the beneficiary is the individual responsible primarily for oversight of the other joint venturer's actions or whether the beneficiary is actually performing the duties outlined in the petitioner's position description.

In addition, counsel's assertion that the petitioner employed independent contractors is not supported in the record. 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). 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 petitioner did not provide copies of contracts or other agreements that demonstrate the petitioner has hired subcontractors to perform the construction work and that the beneficiary is the individual supervising these contractors.

Further, the petitioner's employment of a secretary and an engineer after the filing of the petition and the proposed employment of other individuals do not contribute to a finding of eligibility for this petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Finally, neither counsel nor the petitioner has provided sufficient information regarding the petitioner or the beneficiary's position to establish that the beneficiary is responsible for managing an essential function for the petitioner. The record is bereft of independent documentation supporting counsel's claim that the beneficiary supervises the construction of various housing development projects.

Based on the record, the beneficiary was the only employee of the petitioner at the time of filing the petition. The record does not contain documentation that the petitioner employed or employs outside contractors or that the beneficiary is responsible for supervising outside contractors. Upon review, the petitioner has not provided sufficient evidence to overcome the director's determination that the beneficiary is not acting in a managerial or executive capacity as defined by the Act.

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.