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

[redacted]

File: EAC 01 112 51101 Office: VERMONT SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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]

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 a limited liability company organized in the State of New Jersey in July of 1999. It is engaged in the trading of housewares. It seeks to employ the beneficiary as its president. Accordingly, it 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 had been or would be performing primarily executive or managerial level duties for the United States organization.

On appeal, counsel for the petitioner asserts that the director relied on dated company tax returns and wage records to reach his conclusion. Counsel asserts that the beneficiary will be acting as the company's chief executive officer and has four subordinate employees under him.

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):
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> * * *
>
> (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 had been and would 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
>
> 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.

Th petitioner initially provided a broad position description of the beneficiary's duties for the petitioner as an L-1A non-immigrant. The description, in part, paraphrased elements of the definitions of managerial and executive capacity as noted above. The petitioner also provided its organizational chart depicting the beneficiary's position as president, a vice-president/general manager, an administrative assistant, an administrative assistant/sales and marketing person, and a sales person.

The director requested a more comprehensive description of the beneficiary's duties as well as complete position descriptions for each of the petitioner's United States employees. The director also requested the petitioner's Internal Revenue Service (IRS) Form 941s, Employer's Quarterly Federal Tax Return for the first quarters of 2001. The director also requested the petitioner's IRS Form W-2s, Wage and Tax Statement for the year 2000.

In response, the petitioner stated that the beneficiary would spend 15 to 20 hours per week meeting with the company's subordinate managerial and administrative staff to review various problems the company was facing. The petitioner stated that expanding the leasehold premises, dismissal of an employee or manager, entering into major advertising, marketing, or other company contracts were examples of the issues discussed in the meetings. The petitioner stated that the beneficiary would spend another 10 to 15 hours per week meeting with the company's staff of department managers and administrative personnel of the company's import department, distribution department and administrative /business development department to discuss work assignments, review employee performance, and communicate decisions that had been made to the staff. The petitioner also stated that this time would be spent reviewing, approving or modifying proposed company expenditures, giving instructions and direction on a variety of company matters. The petitioner stated that the beneficiary would spend another 10 to 15 hours per week communicating and meeting with outside business personnel such as the company's accountants, attorneys, senior management of major customers, senior advertising and marketing personnel, and banking officials.

The petitioner also provided job descriptions for the vice-president/general manager, the senior administrative assistant,

the sales coordinator, and the sales person. The petitioner provided IRS W-2s for the year 2000 issued to the vice-president revealing his salary of $11,250, to the senior administrative assistant showing a salary of $18,000, to the sales coordinator revealing a salary of $2,040,and to the sales person showing a salary of $1,560. The petitioner further provided a W-2 issued to an individual in the amount of $1,560 in an unknown capacity and IRS Form 1099, Miscellaneous Income issued to the company's attorney in the amount of $1,800, and to another individual in an unknown capacity in the amount of $1,750. The beneficiary's W-2 revealed wages in the amount of $35,000.

The director found that the petitioner's year 2000 documentation revealed only two of the petitioner's employees were paid at a rate that indicated full time employment. The director determined that it appeared likely that the beneficiary had been and would be primarily engaged in the performance of non-qualifying duties. The director concluded that the record did not demonstrate that the beneficiary's duties had been or would be primarily managerial or executive in nature.

On appeal, counsel for the petitioner asserts that the director relied on dated company tax returns and wage records to reach his conclusion. Counsel also states that the facts are that the beneficiary will not be performing secretarial or clerical duties, will not be performing company bookkeeping or other ministerial financial related duties, and will not be performing sales or sales related duties. Counsel further asserts that the beneficiary will provide company leadership, vision, and guidance to a subordinate staff and that the vice-president/general manager will implement and execute the beneficiary's decisions. Counsel finally asserts that the beneficiary will spend the most significant amount of his time working with and communicating with entities outside the internal company structure.

Counsel's assertions are not persuasive. 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). Counsel's assertions as to the facts are not substantiated in the record. 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).

Counsel notes that the director relied on independent documentation provided by the petitioner in response to the director's request for further evidence when making his decision. Counsel complains that this information is dated but does nothing to rectify the situation. At present, the record contains the petitioner's tax documentation for the year 2000. As determined by the director, the petitioner's tax documentation for the year 2000 does not support a finding that the petitioner employs sufficient subordinate personnel on a full-time basis to carry out

the non-managerial tasks described by counsel and the petitioner. In addition, counsel's assertion that the beneficiary spends a significant amount of his time working with and communicating with entities outside the internal company structure is contradicted by the petitioner's own hourly breakdown of duties for the beneficiary. 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). The petitioner stated that the beneficiary spent 10 to 15 hours of his time devoted to meetings with outside business personnel while spending 20 to 30 hours meeting with the company's subordinate managerial and administrative staff and the company's staff of department managers and administrative personnel.

Further, the petitioner's description of the beneficiary's duties regarding various meetings with its internal staff is confusing. The petitioner states that the beneficiary will meet with the company's subordinate managerial and administrative staff to discuss expanding the leasehold premises, to enter into major marketing, advertising, or other contracts. In addition, the petitioner states that the beneficiary will meet with managerial staff of the company's import, distribution, and administrative/business development departments to discuss work assignments, review employee performance, give instructions and direction on a variety of company matters, and communicate decisions that had been made to the staff. However, the petitioner has not provided any information regarding an import, distribution, or administration/business development department. As depicted on the petitioner's organizational chart, the petitioner employs only a vice-president, an administrative assistant, a sales coordinator, and a sales person in addition to the beneficiary. It is not clear who is in charge of the import, distribution, and administrative/business development departments. Furthermore, the necessity of the beneficiary spending 20 to 30 hours in meetings with "subordinate personnel" is not adequately explained, especially in light of the fact that two to three of the petitioner's four "subordinate" employees do not appear to work on a full-time basis. The description of the beneficiary's duties does not realistically correspond to the petitioner's employees and their duties.

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 realistically 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 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 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.