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: [redacted] Office: NEBRASKA 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)

ON 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.

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 Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Washington in 1994. It is engaged in the importation and sale of used automobiles. 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 had been or would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Service should have granted the petition based on the submission by the petitioner. Counsel also provides a comprehensive description of the beneficiary's duties and responsibilities and an affidavit from the beneficiary in an effort to cure any deficiency in the previously submitted description.

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. 8 C.F.R. 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

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-
>
> 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.

In a letter supporting its petition for classification of the beneficiary as a multinational manager and executive, the petitioner submitted a general description of the beneficiary's position as follows:

> In 1996, [the beneficiary] joined [the petitioner] as its President and CEO. In this position, [the beneficiary] is responsible for establishing goals and policies of the company and its wholly owned subsidiary, Kilometers to Miles Speedometer Exchange, Inc., and overseeing their day-to-day operations. As set forth more fully elsewhere in this letter these activities consist of importing autos to the U.S. from Canada and making modifications to these automobiles prior to their sale in the U.S. so that the autos are in full compliance with U.S. standards before they are sold at auction. [The beneficiary] oversees staff of 12 through on-site manager [sic]. He has the authority to hire and fire as well as take other personnel actions such as promotion and leave authorization.

The director requested additional information on this issue including a description of the beneficiary's intended position in the United States. The director requested the beneficiary's specific job duties, types of employees supervised, and the petitioner's organizational chart.

In response to the director's request the petitioner provided the same description for the beneficiary's duties in the United States as previously submitted with a few grammatical changes. The petitioner also provided its organizational chart. The chart depicted the beneficiary as president of the petitioner and the petitioner's subsidiary. The chart also depicted the manager of the petitioner reporting directly to the beneficiary. The chart further depicted two importation clerks, an accountant, a remanufacturing manager, a speedometer installation supervisor, and a lot manager reporting to the manager. The chart also reflected five additional employees including a production supervisor, a speedometer installer, and three workers.

The petitioner also provided a brief description for the petitioner's employees, including the office manager, accountant,

transportation crew manager, swamper, and the two importation clerks. The petitioner further provided brief descriptions for the petitioner's subsidiary's employees including a description for the positions of lot manager, remanufacturing manager, speedometer installation supervisor, speedometer installer, production supervisor, and three production workers.

The petitioner further provided its Washington State Quarterly Wage Detail Reports for the first and second quarters of the year 2000. The reports revealed that the petitioner employed four individuals during those two quarters including the office manager and the accountant. The job positions for the other two individuals could not be identified. The petitioner's subsidiary, Kilometers to Miles Speedometer Exchange, Inc., Washington State Quarterly Wage Detail Report for the second quarter of 2000 depicted the employment of nine individuals.

The director determined that the record contained insufficient evidence to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service should have granted the petition based on the submission by the petitioner. Counsel also provides a comprehensive description of the beneficiary's duties and responsibilities and an affidavit from the beneficiary in an effort to cure any deficiency in the previously submitted description.

Upon review, 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 initially provided a generalized statement of the beneficiary's duties for the United States entity. The director specifically requested a more detailed description of the beneficiary's duties and the petitioner failed to provide the information to the director. Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). The additional description provided by counsel and the beneficiary's affidavit will not be considered on appeal. The director's request for a description of the beneficiary's duties was unambiguous and the failure of the petitioner to respond cannot be cured by an out of time submission.

In addition, the statutory definitions of executive and managerial capacity refer to an assignment within an organization in which the employee either manages the organization or directs the management of the organization. Section 101(a)(28) of the Act defines "organization" as follows: "The term 'organization'

means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects." It is not clear that the statutory definition of an organization would reasonably include a corporation that is an entity separate and distinct from the petitioning organization. The petitioner has not provided sufficient evidence to establish that the two United States entities are so intertwined as to constitute one entity for immigration purposes. Accordingly, the beneficiary's claimed managerial or executive duties that relate to the employees of the petitioner's subsidiary company may not be considered for purposes of this immigrant visa petition.

Further, the petitioner's brief descriptions of its employee's duties are not sufficient to demonstrate that the beneficiary is or will be a manager of professional, supervisory, or managerial employees. Moreover, the titles of individual positions on the petitioner's organizational chart do not completely conform to the titles contained in the petitioner's identification and description of its employee's duties. 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). Likewise, the names of individuals on the petitioner's Washington State Quarterly Wage Detail Report do not completely conform to the individuals identified on the organizational chart or to the individuals identified as employed in the positions briefly described by the petitioner.

Upon review, the record before the director was insufficient to demonstrate that the beneficiary will be 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 description of the beneficiary's job duties is vague and fails 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. See section 101(a)(44)(A)(iii) and (iv) and section 101(a)(44)(B)(ii) of the Act. 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.

Beyond the decision of the director, we note the director addressed the issue of the beneficiary's duties for the claimed foreign employer but did not definitively conclude that the petitioner had failed to demonstrate that the beneficiary had been acting in a managerial or executive capacity for the foreign entity prior to his entry into the United States as a non-immigrant. The petitioner also provided a general description for the beneficiary's position with the claimed foreign employer. It cannot be determined from the position description provided that the beneficiary's duties for the claimed foreign employer were managerial or executive in nature.

Also beyond the decision of the director, the petitioner has not provided consistent information showing that a qualifying relationship exists between the petitioner and the claimed foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas entity.

The petitioner in this instance has provided affidavits of the corporate representatives of the various companies owned by the beneficiary to establish the petitioner's and the foreign entities ownership and control. The petitioner has not provided copies of the stock certificates or the stock transfer ledger to support the affidavits of the corporate representatives. The petitioner did provide a copy of its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2000. However, IRS regulations for S corporations do not allow foreign or corporate ownership. Internal Revenue Code § 1361 (a) and (b). It is thus unclear if the petitioner is owned and controlled by a foreign person as required for immigration purposes or is owned and controlled by individual(s) qualifying under the tax regulations as owners of an S corporation. As noted above, inconsistencies such as these must be adequately explained in order to qualify for this visa classification. Matter of Ho, supra.

As the petition is dismissed for the reason stated above, these issues are not examined further.

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.