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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: VERMONT SERVICE CENTER Date: JAN 15 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:

SELF-REPRESENTED

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 approved by the Director, Vermont Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company organized in the state of Delaware that is engaged in the import and export business. It seeks to employ the beneficiary as its president and finance manager. Accordingly, it seeks 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 initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. After properly issuing a notice of intent to revoke, the director revoked the approval of the petition on July 6, 2001. In the revocation decision the director set out the reasons for the revocation and noted that the petitioner had elected not to provide position descriptions for all the individuals employed in the beneficiary's department of the United States enterprise.

On appeal, the petitioner states that it had provided through its previous counsel five pages of information regarding position descriptions for each of its employees. The petitioner asserts that the evidence in the record demonstrates that the beneficiary has met the requirements for an employment-based immigrant.

It is not clear from the director's decision whether the director considered the position descriptions provided by the petitioner in response to the notice of intent to revoke and found them lacking in information or whether the director failed to consider the position descriptions. As the record is unclear in this regard, we will consider the pertinent information submitted in rebuttal to the director's notice of intent to revoke.

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.

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 for the United States entity.

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-
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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
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner stated the beneficiary had been and would be responsible for overseeing all business operations of the company. The petitioner stated that the responsibilities entail the following:

> [S]etting organizational goals and policies, hiring and directing professional personnel, coordinating with our overseas parent company and making other fundamental business decisions. In addition, as Finance Manager, he has overseen all financial operations of the company, including negotiating letters of credit and other financial instruments, managing accounts payable and receivable, ensuring compliance with tax requirements, and analyzing financial aspects of proposed transactions.

The petitioner also provided a copy of share certificate number 1 showing 1,000 shares had been issued to the petitioner's claimed parent company. The petitioner also provided two pages of its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 1996. The 1996 Form 1120 revealed, $4,320,589 in gross receipts, no compensation paid to officers and $49,500 paid in salaries.

As noted above, the director initially approved the petition and subsequently upon review issued a notice of intent to revoke the approval. In the notice of intent to revoke, the director set out his reasons for revocation and requested additional information to demonstrate that the beneficiary would be employed in a primarily executive or managerial position. The director requested complete position descriptions for all of the petitioner's employees in the

United States including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis. The director also requested the petitioner's IRS W-2 Forms issued to its employees in 1998 and 1999 and any IRS 1099 Forms, Miscellaneous Income, issued to contractors. The director further requested the petitioner's IRS 1120 Forms for the years 1997, 1998, and 1999.

In rebuttal to the notice of intent to revoke, the petitioner provided the following brief position descriptions for its employees:

> President
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> President's job duties are to oversee job duties of Vice President, Marketing Manager, Purchasing Manager and Traffic Manager, to make market strategies for the company, including sale [sic] Chinese products to U.S, and other markets and sale [sic] U.S. products to China, to make important financing and business decisions and to make final decisions on recruiting employees and contractors.
>
> It is also his duty to report operations of the company to General Manager [of the parent company in China].
>
> Vice President
>
> Vice President's job duties are to assist the president, to coordinate job duties of other managers and marketing, to recruit employees.
>
> It is also Vice President's duty to work in President's position when President is absent from office.
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> Marketing Manager
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> Marketing Manager's job duties are to work out specific marketing plans for U.S. and Chinese markets and other markets, identify market requirements for new products, to keep daily contacts with customers and potential customers, to implement sale contracts, to report to President or Vice President on developments of markets and costs of sale.
>
> Purchasing Manager
>
> Purchasing Manager's job duty are [sic] to source products from China, to identify new products, to keep daily contacts with suppliers in China, to implement purchase contracts, to report to President or Vise [sic] President on developments and costs of purchase.

Traffic Manager

Traffic Manager's job duty is to coordinate with transportations [sic] of incoming shipments from China when being uploaded from ocean vessel at port in Los Angeles, CA and forward shipment to final destinations inland and inspect condition of packing to make sure shipments delivered to customers are intact.

Secretary

Secretary's job duties are as [sic] to keep files in good order, to arrange President's schedule, to prepare fax or email for President.

The petitioner also noted that each employee was expected to work 40 hours per week, except for the traffic manager and secretary who would work 30 to 40 hours per week and 20 to 30 hours per week respectively. The IRS W-2 Forms issued by the petitioner for the years 1998 and 1999 depicted the same five employees. The petitioner's IRS 1120 Form for the year 1998 revealed gross receipts in the amount of $3,275,862, and that $35,859 was paid to the beneficiary as an officer of the company, and salaries were paid in the amount of $79,600.

The director determined that the brief descriptions provided by the petitioner were insufficient to establish that the beneficiary's position would be executive in nature. The director also noted that the duties of some of the managers and "executives" appeared to duplicate the beneficiary's duties. The director concluded that the record did not support a finding that the beneficiary would be employed in a primarily executive or managerial capacity and that the organization could support such a position.

On appeal, the petitioner states that there is no size requirement for an organization and that the Service's determination regarding the size of the company is not supported on a legal ground. The petitioner also sets out the definition of "executive capacity" and asserts that the beneficiary is the only person responsible for performing the defined elements as noted in the position description provided. The petitioner also set out the definition of "managerial capacity" and asserts that the beneficiary manages the company by supervising the other managers and an outside accountant and by making final recruiting decisions for the company.

It is noted that the petitioner claims that the beneficiary will be engaged in both executive and managerial duties. However, a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager. A

beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's assertions that the beneficiary is engaged in executive and managerial duties 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 position description that refers, in part, to duties such as "setting organizational goals and policies, hiring and directing professional personnel, coordinating with our overseas parent company and making other fundamental business decisions," and "to oversee job duties of Vice President, Marketing Manager, Purchasing Manager and Traffic Manager." It is not possible to determine from this general and ill-defined description whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. Moreover, this job description in part simply paraphrases elements of the executive and managerial definitions without describing the actual duties of the beneficiary with respect to the daily operations.

In addition, the position description also states that the beneficiary will negotiate letters of credit and other financial instruments and manage the accounts payable and receivable. These duties are more indicative of an individual providing financial services to the petitioner rather than managing the services through the work of others. 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).

Further, the petitioner has not provided any supporting documentation to establish that the beneficiary has actually conducted the broadly cast description of his duties such as "report[ing] operations of the company to General Manager [of the parent company in China]." Furthermore, the petitioner's claim that the beneficiary supervises other managers is not supported in the record as it is clear from the position descriptions for the other employees that the employees are not managers except in position title only. 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's statement that there is no size requirement for a petitioner to support a manager or an executive is correct. However, staffing levels of a petitioner may be considered when reviewing the claimed managerial or executive duties if the Service takes into account the reasonable needs of the petitioner in light of the overall purpose and stage of development of the

organization.

In the case at hand, the petitioner was a three-year-old international trading company at the time the petition was filed. It had gross receipts of $3,275,862, and employed the beneficiary as president, his wife as vice-president, three individuals with position titles that contained the designation "manager," and a secretary. The petitioner does not provide sufficient evidence detailing who performs the non-qualifying duties of the petitioner. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves 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.

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 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 petitioner's statement regarding the previous two approvals of the beneficiary's employment-based classification with this same evidence is injudicious. Upon close review of the record the director has noted the error of the approvals and has properly notified the petitioner of his intent to revoke the approval and has ultimately revoked the approval of those petitions. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988).

Beyond the decision of the director, the petitioner has provided confusing documentation regarding its qualifying relationship with the claimed Chinese parent company. 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 company. The petitioner was incorporated in Delaware in 1995. The petitioner provides a copy of its share certificate number 1 issuing 1000 shares to the claimed Chinese parent company. The certificate bears the notation that the petitioner is authorized to issue 1000 shares of capital stock. On appeal, the petitioner submits share certificate number 12 also issuing 1000 shares to the claimed Chinese parent company. This share certificate also bears the notation that the petitioner is authorized to issue 1000 shares of capital stock, although the number "1000" is smudged. Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this immigrant visa classification. Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988); Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986)(in non-immigrant proceedings); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982). The record does not contain information regarding share certificates 2 through 11 and does not contain information regarding the issuance of 1000 additional unauthorized shares to the claimed parent company. The record is deficient in this regard and impacts significantly on the evidentiary showing of ownership and control. As the petition will be dismissed for the reason stated above, this issue is 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.