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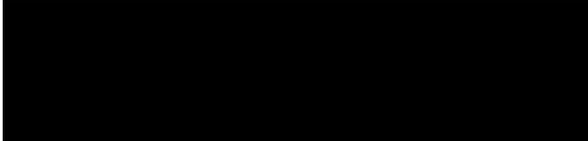
U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 02 005 50670 Office: VERMONT SERVICE CENTER

Date: **JAN 15 2003**

IN RE: Petitioner:
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:



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

Myra L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the employment-based preference visa and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New York corporation that is engaged in the import and distribution of Irish goods, particularly "The [REDACTED] [REDACTED] It seeks to employ the beneficiary as its president and, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition on the basis that the proffered position is neither executive nor managerial in nature.

On appeal, counsel does not submit a brief or additional evidence. Counsel merely states that the Service's prior approval of an L-1A nonimmigrant visa in the beneficiary's behalf for the same position as the proffered position is inconsistent with the denial of employment-based preference visa.

Section 203(b) of the Act states, in pertinent part:

(C) 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.

In the initial petition filing, the petitioner described itself as a distribution company for "The [REDACTED] an industrial rubbish compactor. The petitioner claimed to employ three persons and have a gross annual income of \$839,000. According to the petitioner, the beneficiary has been employed as its president in L-1A nonimmigrant status. The proffered position of vice president was described in the initial petition as follows:

- The setting up of Company Policies.

- The Recruitment of employees and delegation of responsibilities to them.
- The control of all Financial Transactions for Kenbay Compaction Systems Inc.
- Direction of all Company Operations including Technical and Sales operations.

The director found that the petitioner's initial description of the proffered position was insufficient. He, therefore, requested that the petitioner submit a more detailed description of the proffered position as well as job descriptions for the company's other employees. In response, the petitioner submitted an expanded description of the proffered position:

[The beneficiary} - President

Duties Performed:

- 1) Control of all financial transactions for [REDACTED]
- 2) Estimating requirement stock forecasts and stock level requirements.
- 3) Setting company policy and negotiating major contracts or the approval of same.
- 4) Providing specialized technical advice to our outside sales force and to our multinational customers.
- 5) Recruitment and hiring of employees.
- 6) Setting company policy on recruitment of area representatives and terms of business or the approval of same.
- 7) Overall administration management of [REDACTED]

In addition, the petitioner stated that it employed one distribution manager who managed one employee. The distribution manager's job was described as:

- 1) Direct sales in New Jersey and New York.
- 2) Demonstrating machines to prospective customers.
- 3) Recruitment of area sales representatives.
- 4) Ensuring the right machines go to the right customers on time and keeping records of serial numbers, date of purchase and all transactions.
- 5) Ensuring [REDACTED] consumables are also delivered efficiently, on time and keeping records of same.

The petitioner's third employee, who was supervised by the distribution manager, was described as an individual who takes telephone orders for [REDACTED] equipment and ensures that the orders are packaged and properly invoiced. The petitioner also stated that it employed a company, Phoenix International, to perform its warehousing and transportation of goods. Finally, the

petitioner provided a list of its "area representatives," which consisted of companies and one individual that sold the petitioner's products. The petitioner also indicated on this list that it employed a "C.E.O." to perform secretarial duties.

The director found that the proffered position was neither executive nor managerial in nature, and he denied the petition. The director noted that the beneficiary would perform sales duties such as negotiating contracts and purchasing equipment, and supervising non-professional employees. The director found such duties inconsistent with a person who works primarily as an executive or manager.

On appeal, counsel makes three brief statements. First, counsel states that the decision "is incorrect on the law and the facts;" however, counsel does not support such a claim with any evidence in rebuttal. Second, counsel states that the denial of the immigrant petition is inconsistent with the L-1A nonimmigrant visa petition that the Service previously approved in the beneficiary's behalf. Third and finally, counsel notes that the beneficiary is an executive who is in charge of the U.S. operations and as such, qualifies as a multinational executive or manager.

Pursuant to 8 C.F.R. 204.5(j)(2):

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;

- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. Champion World, Inc. v. I.N.S., 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir.(Wash.) July 30, 1991) (emphasis in original).

The petitioner's description of the proffered position shows that the beneficiary does not perform the specified responsibilities that are found in the definitions of executive capacity or managerial capacity. The beneficiary spends his time negotiating contracts, providing advice to customers, and overseeing financial transactions. None of these duties could be considered a high level responsibility of an executive or a manager. Moreover, the petitioner's staffing levels and organizational structure does not require the services of an individual who only executes executive-level or managerial-level duties.

If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001).

Here, the petitioner claims to employ one distribution manager, who supervises a clerical employee. The petitioner also claims to have entered into contractual agreements with a warehouse/delivery company and several sales representatives, and to have "C.E.O." perform its secretarial duties.

Regarding its alleged contractual employees, the petitioner did not submit any documentary evidence of the contractual agreements

that the petitioner has with these companies and the types of services they provide. There is also no evidence of the type of control, if any, that the beneficiary exerts over the contracted employees. Additionally, the record does not contain any information to identify the individual or company that is called "C.E.O." Simply 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).

Regarding its alleged full-time employees, who are a distribution manager and one other non-titled employee, the petitioner has not established that these individuals are employed in the capacities that the petitioner has alleged. A review of the distribution manager's job description reveals that the individual occupying this position does not function in a managerial role; he is a manager in title only. According to the petitioner, the distribution manager demonstrates machines to customers, records an equipment's serial number, maintains records on equipment sold, and ensures that equipment is delivered on time. Typically, managers manage a function, department or organization. The distribution manager here, however, performs the services of the petitioner's operations, which includes the sales of equipment. 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 capacity. Matter of Church Scientology International, 19 I&N Dec. 593 (BIA 1988). Thus, the Service will not conclude that the beneficiary supervises one subordinate managerial employee.

More importantly, however, a close examination of the evidence reveals that the wages paid to the distribution manager and the one other employee amounted to \$8,250 in the year immediately preceding the filing of the petition. Such low wages are not indicative of individuals who work full-time during the year, and who are available to execute the routine day-to-day tasks of the petitioner's operations. Thus, the petitioner's staffing levels at the time the petition was filed indicate that the reasonable needs of the petitioner in light of its overall stage of development did not require the services of an individual whose only responsibilities would be to execute primarily executive or managerial duties. The beneficiary filled the roles of salesperson and marketing representative. No evidence in the record supports a finding that the beneficiary functions primarily as an executive or a manager in his role as president of the petitioning entity. Accordingly, the director's decision will not be disturbed.

The Service notes that counsel did not prepare a substantive appeal. His only argument in rebuttal to the director's decision is that the immigrant petition should be approved because the Service previously approved an L-1A petition in the beneficiary's behalf for the same position as the proffered position.

The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593 (BIA 1988). Based upon the evidence that the petitioner has presented in this petition filing, the approval of the L-1A petition in the beneficiary's behalf for the same position could be considered gross error on the part of the Service. The Associate Commissioner is not bound by the rulings of the service centers. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct. 51 (U.S. 2001).

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.