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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]

File: WAC 00 262 52832 Office: CALIFORNIA SERVICE CENTER Date: JAN 30 2003

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]

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, California Service Center. 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 California in March of 1995. It claims to be engaged in importing and marketing synthetic leather. It seeks to employ the beneficiary as its vice general 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 determined that the evidence of record did not demonstrate that the beneficiary would be performing the duties in a managerial or executive capacity. The director also determined that the record was deficient in establishing that the beneficiary had served in a managerial or executive capacity for the foreign entity for one year in the three years preceding her entry into the United States as a non-immigrant.

On appeal, counsel for the petitioner asserts that the Service has not followed its own regulation as it relates to function managers. Counsel also asserts that the number of employees within an organization is not dispositive. Counsel further provides a more detailed job description and concludes that the beneficiary is performing the duty of a manager. Counsel finally asserts that the petitioner has provided evidence that the beneficiary worked abroad in a managerial capacity.

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 first 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-
>
> 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 through its counsel initially stated that the beneficiary manages the function of importation and marketing of synthetic leather into the United States; the essential function is within a subdivision of the organization, that is the United States subsidiary is the subdivision of the employer abroad; she is personally responsible for, and has sole authority for all decisions relating to the importation of hundreds of thousands of dollars of synthetic leather; and she exercises direction over day-to-day operations of the function for which she has authority often seven days a week.

The director requested additional evidence to establish that the beneficiary would be performing the duties of a manager or executive with the United States company. The director requested the petitioner's organizational chart, a brief description of job duties for those employees under the beneficiary's supervision, and the source or remuneration of all employees.

In response, the petitioner provided a copy of its organizational chart depicting a president, the beneficiary's position of deputy general manager, and an assistant in marketing. The petitioner provided the following description of the beneficiary's duties:

> As the deputy general manager of [the petitioner] [the beneficiary] is mainly responsible for the stateside branch business management, marketing and execution of the program policies and all kinds of decisions made by the company board and reporting directly to the president and board of directors of the parent company.

The director noted the vague descriptions provided by the petitioner and that the beneficiary had no employees to supervise. The director concluded that the beneficiary would be involved with the day-to-day non-supervisory duties of providing services and that the beneficiary would not be performing the duties of an executive or manager.

On appeal, counsel for the petitioner states that the beneficiary has a senior level position in the company and is not required to have supervisory duties. Counsel also states that a person who does not supervise employees may qualify as a manager. Counsel further provides a more detailed job description submitted by the

beneficiary that states her responsibilities as follows:

> Decision makers [sic] --- determining market strategy on American markets and determining and adjusting price level in this market.
>
> Visiting customers and having regular meetings or phone conference [sic] with presidents of our customer corporations to discuss market needs. And make reports to Management of head office in China.
>
> Giving hearings to customers regarding quality requirements and problems [sic]
>
> And responsibilities related to accounting such as report and prepare financial reports for every month and every year and deposit tax and pay duties. Issuing invoices to customers, deposit checks and wire the money back and issuing checks for all kinds of expenditures necessary and prepare pay rolls [sic]. Having meetings with accountant for all financial reports.
>
> Coordinate the relationship and business activities between our head office and customers in this market and coordinate between customers sales areas to avoid competition among customers in order to guarantee company's interests.
>
> Travel back to head office once a year doing annual report to the board of the parent company.

Counsel asserts that the job description shows that the beneficiary functions at a senior level within the organizational hierarchy and with respect to the function managed and thus the beneficiary is performing the duty of a manager.

Counsel's assertion is 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). Counsel for the petitioner initially provided a broad position description re-stating portions of the definitional criteria of managerial capacity. Counsel named the function the beneficiary was claiming to manage followed by statements that the beneficiary was responsible for decisions relating to the import of leather and exercising direction over day-to-day operations. This general statement does not convey an understanding of what the beneficiary will be doing on a daily basis. In addition, paraphrasing the regulatory definition of "managerial capacity" without describing the actual duties does not contribute to a finding that the beneficiary has been or will be primarily employed as a manager or executive.

The petitioner's response to the director's request for evidence does not significantly add to an understanding of the beneficiary's actual duties. The beneficiary's responsibilities are vaguely referred to, in part, as "marketing and execution of the program policies and all kinds of decisions made by the company board." The most that can be gained from this description is that the beneficiary has some responsibility for marketing and implementing decisions of others. Such responsibilities are more indicative of an individual providing a basic service for the petitioner rather than managing the service. 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).

The beneficiary's own description of her duties provided on appeal contains information that sheds some light on what the beneficiary actually does for the petitioner. However, the information provided is also more indicative of an individual performing the basic tasks of the petitioner rather than managing the tasks. The description indicates that the beneficiary will determine market strategy, visit customers, prepare financial reports, issue invoices, perform banking duties, and coordinate business activities between the head office and the customers. Again, the position description provided does not support a finding that the beneficiary is managing a function or a subdivision of the petitioner.

Counsel's statement that the beneficiary has a senior level position and is not required to supervise employees pertains to only one element of the definition of "managerial capacity." In the case at hand, the beneficiary is one of two employees out of the petitioner's three employees that have a senior title. However, the title does not alter the fact that the beneficiary is performing the necessary tasks of the petitioner rather than managing those tasks.

Counsel's attempt to establish that the beneficiary is a functional manager is also not persuasive. Counsel's description of the petitioner's essential function is the necessary operation of the business, importing synthetic leather and marketing the leather to United States customers. To reiterate once more, the record shows that the beneficiary is providing the necessary services to the petitioner to perform the basic operation of the petitioner. The beneficiary is not "managing" an essential function.

Counsel's assertion on appeal that the beneficiary also manages the work and performance of 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 record contains no independent evidence that the petitioner employed independent contractors.

Counsel's reference to the staffing levels of the petitioner and that the number of staff is not dispositive of the issue of managerial capacity under the regulation is noted. However at the time of filing, the petitioner was a five-year-old import company that employed a president, the beneficiary as vice general manager, and an assistant in marketing. The petitioner did not submit evidence that it employed sufficient subordinate staff members to perform the actual day-to-day, non-managerial operations of the petitioner. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a president, a vice general manager, and a marketing assistant. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial 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 a portion of the position description serves to merely paraphrase the statutory definition of managerial capacity. The description of the duties to be performed by the beneficiary does not sufficiently 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 her 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 second issue in this proceeding is whether the petitioner has established that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner initially submitted brief descriptions of the beneficiary's duties for the overseas entity. On appeal, counsel for the petitioner references the past approvals of an L-1A classification for the beneficiary in an attempt to persuade the Service that the beneficiary's previous employment was managerial in nature. However, if the

previous non-immigrant petition was approved based on the same unsupported assertions that are contained in this petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, 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., Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988). The petitioner has not provided evidence that the beneficiary's employment with the foreign entity was in a managerial 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.