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U.S. Department of Justice

Immigration and Naturalization Service

MOAAO/ULLB 3rd Fl

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

[redacted]

File: WAC 01 277 58987 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]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 corporation organized in the State of California on December 30, 1999. It is engaged in import, export, and trading. It seeks to employ the beneficiary as its president. Accordingly, it seeks classification of 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 would be employed in an executive or managerial capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the nature of the beneficiary's job duties and its business establish that the beneficiary is functioning as an executive. Counsel also asserts that the beneficiary is not a first-line manager and is functioning 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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
>
> (A) If the alien is outside the United States, in the three years immediately preceding the filing of

the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary will be performing managerial or executive duties.

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.

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 petitioner stated in the initial petition that the beneficiary's duties would include the following:

> Plan, develop and establish firm's policies and objectives in accordance with board directives and corporate charter; plan business objectives, including developing procedures for attaining those objectives, to develop organizational policies and to coordinate functional [sic] and operations; review activity reports and financial statements to determine the status of the firm objectives and progress toward attaining those objectives; periodically revise firm objectives and plans in accordance with current economic and political conditions; direct and coordinate the formulation of financial programs to provide funding for new or continuing operations in order to maximize return on investments and to increase

> productivity; evaluate the performance of executives for compliance with firm's established policies and objectives and contributions toward attaining those objectives.

The petitioner also submitted its organizational chart depicting the beneficiary as president, a sales and marketing manager, a finance and administrative manager, two sales representatives, a market research analyst, and an administrative assistant. The petitioner also submitted its California Form DE-6, Quarterly Wage Report for the quarters ending March 31, 2001 and June 30, 2001. The California Form DE-6 for the quarter ending March 31, 2001 reflected two employees in the positions of finance and administrative manager and sales representative. The California Form DE-6 for the quarter ending June 30, 2001 reflected five employees for the first month of the quarter and six employees for the second and third months of the quarter whose identities correlated with the positions described on the petitioner's organizational chart. The Form DE-6 for the second quarter also revealed that the beneficiary was paid $12,000, the sales manager $6,000, the finance and administrative manager $6,000, the sales representative/purchasing assistant $3,600, a sales representative $2,400, and the administrative assistant/secretary $3,000. The petition was filed in August of 2001 so that the California Form DE-6 for the pertinent third quarter of 2001 was not yet available.

The director requested a more detailed description of the beneficiary's duties in the United States and the percentage of time spent on each duty. The director also requested a list of all employees under the beneficiary's direction.

In response the petitioner submitted the following description:

> He develops various corporate policies to achieve objectives and goals which he establishes for the Firm and which conforms to Board directives. The percentage of time spent will generally be 35 percent.
>
> He reviews the analysis of the business environment which includes reasoned projections to determine the most promising opportunities for the Firm. The percentage of time spent will generally be 10 percent.
>
> He reviews business strategies for positioning the Firm for future growth. The percentage of time spent will generally be 10 percent.
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> He reviews finance, sales and marketing strategies to insure they achieve operational efficiency & economy, and to insure they comply with Company's goals and Board directives; he reviews strategies for developing new markets and for increasing the Company's

competitive position with its industry and he coordinates operations between the Firm's departments. The percentage of time spent will generally be 25 percent.

He represents the Firm at trade association meetings, or major trade events to promote good will and to improve the Company's image and relations with customers and vendors. The percentage of time spent will generally be 15 percent.

He reviews the analyses of the Firm's operating budget, business activities, operation & sales reports to determine the need for operational changes. The percentage of time spent will generally be 2 percent.

He evaluates the performance of manager and executives and he has the authority to hire and fire the employees under his supervision. The percentage of time spent will generally be 3 percent.

The petitioner also included brief job descriptions for its employees. The description for the sales manager included responsibilities for analyzing sales statistics, reviewing the market, and acting as liaison between the sales department and other sales-related units. The finance and administrative manager's job description included reviewing reports, administering policies and procedures, directing the activities of subordinates, and reviewing the company's and finance department's budget. The sales representative's duties involved sales, product quality and inventory control, developing new markets and advertising programs, and recommending budgets to the sales manager. The sales representative/purchasing assistant's duties involved sales by phone, writing purchase orders, and conferring with suppliers regarding deliveries. The administrative assistant/secretary's duties included maintaining accounting records and processing orders for merchandise, and secretarial duties.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 2000 that included the petitioner's fiscal year through November 30, 2001. The IRS Form 1120 revealed salaries paid in the amount of $93,300, that no compensation was paid to officers and taxable income of $9,938.

The director concluded that the beneficiary could not qualify as an executive because the petitioner was a small six-employee import and export company and because this company did not possess the organizational complexity to warrant such an employee. The director also determined that the beneficiary would be essentially a first-line supervisor over non-professional and non-managerial employees. The director also determined that the description of

the beneficiary's duties was too vague to convey an understanding of what the beneficiary would be doing on a daily basis. The director ultimately concluded that the evidence failed to demonstrate that the beneficiary was employed in a managerial or executive capacity by the petitioner and as such was ineligible for this classification.

On appeal, counsel asserts that the Service is incorrect to base its decision solely on the petitioner's size and type of business. Counsel also asserts that consideration should be given to the fact that this company is a start-up company. Counsel further asserts that evidence has been submitted to show that the beneficiary performs the major role in the company and references the petitioner's business plan developed by the beneficiary. Counsel finally asserts that the beneficiary also qualifies as a manager and states that the beneficiary does not work directly with non-supervisory employees.

Counsel is correct that the director's conclusory statement that a small import and export company necessarily would not require an executive is not the basis of a proper analysis. Counsel's citation to an unpublished case notwithstanding, the Service will focus first on the job description provided by the petitioner. See 8 C.F.R. 204.5(j)(5). As noted by the director in his decision, however, the petitioner has only provided a general job description for the beneficiary. The petitioner has indicated that the beneficiary spends 35 percent of his time developing policies. This statement merely paraphrases the second element of the statutory definition of "executive capacity." See Section 101(a)(44)(B)(ii). The description also provides that the beneficiary spends approximately 35 percent of his time reviewing business, finance, sales, and marketing analyses and strategies. The petitioner does not submit evidence to establish that the beneficiary has actually conducted this broadly cast description. The description provides that another 15 percent of the beneficiary's time is spent at trade associations and events to promote the company. The Service is unable to determine from the job description provided whether the beneficiary is performing executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

The brief and general job descriptions for the petitioner's five other employees does not sufficiently convey an understanding of the delineation of duties amongst the various employees. It appears that the job description for the beneficiary overlaps with duties described for other employees. Upon review, the Service cannot conclude, based on the job descriptions, that the beneficiary will be relieved from performing non-qualifying duties by the other members of the petitioner's staff so that the majority of his time will be spent on duties that are executive in nature.

Counsel's assertion that the Service should take into

consideration that the petitioner is a start-up company when reviewing the beneficiary's executive status is not relevant to the case at hand. A petitioner must be established and have been doing business for one year at the time of filing the petition to even be eligible to apply for this immigrant visa classification. See 8 C.F.R. 204.5(j)(3)(i)(D). Moreover, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). At the time of filing the petition in August of 2001, the petitioning enterprise had been incorporated for more than a year, although it is questionable that it had been doing business for one year prior to filing the petition as will be discussed below.

Counsel's assertion that the beneficiary is a manager is also not persuasive. In looking at the four essential elements that the beneficiary must meet to be considered a manager, the evidence must demonstrate that the beneficiary, manages the organization, supervises and controls the work of other supervisory, professional, or managerial employees, has the authority to hire and fire or recommend these and other personnel actions, and exercises discretion over the day-to-day operations over which the employee has authority. Counsel's assertion that the beneficiary performs these tasks is not sufficient. 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). The petitioner employed the beneficiary, a sales/marketing manager, a finance/administrative manager, a sales representative, a sales representative/purchasing assistant and an administrative assistant/secretary in the quarter preceding the filing of the petition. The position descriptions do not indicate that any of these positions are positions that require professionals. The two individuals identified as managers apparently do not spend a majority of their time supervising others and it is not clear that they are required to manage a function. The position descriptions are deficient in describing these individuals as supervisory or managerial employees. The placement of these individuals on an organizational chart interspersed between the beneficiary and three other employees is not sufficient in and of itself to connote managerial or supervisory status. The record does not establish that the beneficiary is a manager who will supervise professional, managerial, or supervisory employees.

The record contains insufficient evidence to demonstrate 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 definition of "executive capacity." The description of the duties to be performed by the beneficiary does

not demonstrate 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 will manage 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 title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has submitted evidence of only two transactions occurring in the year prior to the filing of the petition. It is not clear from the record that the petitioner was engaged in the regular, systematic, and continuous provision of goods and/or services one-year prior to filing the petition. The petitioner's IRS Forms 1120 although helpful do not establish that the petitioner was providing goods and services on a systematic basis prior to August 13, 2000. As the petition is 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.