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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

[redacted]

File: [redacted] 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 initially approved by the Director, California 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 corporation organized in the State of California in 1994. At the time of filing the petition it was engaged in the import and export of general merchandise. 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 would be employed in a primarily executive or managerial capacity. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel for the petitioner asserts that the Service's revocation decision was in error.

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 director initially approved the petition on May 14, 1996. The beneficiary attended an adjustment of status interview in June of 1997. As a result of the interview an investigation was conducted on the issue of the petitioner's qualifying relationship with the beneficiary's overseas employer. Based on information from the investigation, a notice of intent to revoke was issued in May of 2001. The petitioner timely responded to the notice of intent to revoke. On September 21, 2001, a second notice of intent to revoke was issued to the petitioner, again questioning the petitioner's qualifying relationship with the beneficiary's overseas employer and also questioning the managerial and executive capacity of the beneficiary's proposed position. The petitioner again timely responded to the director's notice of intent to revoke. The director issued his decision on October 24, 2001 and this appeal followed.

The first 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;
>
> 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;
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> ii. establishes the goals and policies of the organization, component, or function;
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> 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 initially submitted a description of the beneficiary's duties as follows:

> The duties of the employee on [sic] the position to be performed include (but not limited to): to direct, supervise and coordinates [sic] foreign sales and market activities; to negotiate contract [sic] with foreign company's representatives, and distribution centers to establish our company's products in international markets and outlets; to direct and supervise managerial staff in expediting export correspondences, bid requests and credit collection; to direct the quality enhancement of our production from China to foreign standards and specifications so as to insure efficient and effective operation under foreign conditions; to direct and supervise the arrangement of shipping details, such as export licenses, customs, declarations, and packing, shipping and routing of products; to direct and supervise supervisory technical staff in the preparation of foreign language sales manuals as well as to expedites [sic] import-export arrangement and maintain current information on import-export tariffs, licenses, and restriction.

The petitioner also stated that it employed an accountant and a sales department manager.

The director determined that the beneficiary would be serving as a first-line supervisor of two non-professional employees and that the description of his duties did not reflect managerial or executive responsibilities. The director concluded that the beneficiary would not be acting in either an executive or managerial capacity. The director does not explain why the evidence provided by the petitioner in response to the notice of intent to revoke is not considered in the director's decision.

On appeal, counsel for the petitioner provides essentially the same evidence provided to the Service in response to the director's two notices of intent to revoke, including evidence of the purchase and development of several luxury home and condominium projects. Counsel asserts that the petitioner is now a real estate development company and that the petitioner contracts with a general contractor to develop projects. Counsel also asserts that the petitioner employs a chief financial officer who has a bachelor's degree. Counsel further asserts that the director did not consider the reasonable needs of a real estate developing company when considering the staffing level of the petitioner and determining that the beneficiary would not be employed in a primarily managerial or executive capacity.

It is noted that neither counsel nor the petitioner clarifies whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. It appears that the beneficiary may be claiming to be employed as both a manager and an executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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.

Counsel's evidence regarding the current business of the petitioner and the beneficiary's duties and responsibilities in relation to the new business does not contribute to a finding of eligibility for the beneficiary at the time of filing the petition. 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 petitioner was an international trading company with one employee. The petitioner's Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return for the quarter in which the petition was filed indicates that the petitioner only employed the beneficiary. The organizational chart provided by the petitioner depicts the beneficiary as president and a sales department and an accounting office. However, the petitioner offered no independent evidence that the sales department and accounting department were staffed with employees.

In response to a request for evidence by the director in April of 1996, the petitioner provided a description of duties for an accountant and a sales department manager. The IRS Form 941 for the quarter subsequent to the filing of the petition depicted that two additional employees had been hired. As noted above, however, eligibility for this classification must be established at the date of filing the petition. Matter of Katigbak, supra.

The description of the beneficiary's duties at the time of filing revealed an individual primarily involved in providing services to the petitioner. 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). Although the description for the beneficiary's position indicated that the beneficiary would "direct and supervise managerial staff," and "direct and supervise supervisory technical staff," the petitioner did not employ any subordinate staff at the time of filing.

Counsel's assertion that the director should consider the reasonable needs of the petitioner is correct, although in this case, the director must look at the reasonable needs of the petitioner at the time of filing the petition when the petitioner was engaged in the international trading business. Section 101(a)(44)(C) of the Act, requires that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. It is not readily apparent from the Service's decision that the director based his decision on the staffing levels of the petitioner rather than the nature of the petitioner's business and the type of the petitioner's employees. However, we address the issue here.

At the time of filing, the petitioner was a year-old trading company that claimed to have a gross annual income of $315,850. The firm employed the beneficiary as president. The petitioner did not provide evidence that it employed any subordinate staff that would perform the actual day-to-day, non-managerial operations of the company. Based upon the petitioner's representations, it does not appear that 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 will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties indicate that a majority of his duties relate to the performance of basic operational tasks for the petitioner. 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 at the time of filing the petition had been or would be employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner had established its ability to pay the beneficiary the proffered wage. The petitioner initially submitted IRS Forms 1120, U.S. Corporation Income Tax Return for 1995 and 1996. The petitioner also submitted IRS W-2 Forms, Wage and Tax Statements issued to the beneficiary. The information revealed by these forms shows that the petitioner had been paying the beneficiary an amount equivalent to the proffered wage. The director's decision regarding the beneficiary's ability to pay the proffered wage is withdrawn.

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, that burden has not been met.

ORDER: The appeal is dismissed.