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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: WAC 01 010 52980 Office: CALIFORNIA SERVICE CENTER Date: JAN 31 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:

[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 engaged in the organization, preparation, and development of cultural, educational, and professional trips, tours, and internships between the United States and Europe. It seeks to employ the beneficiary as its assistant president for marketing. 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 petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service did not properly consider the evidence submitted by the petitioner. Counsel further asserts that the Service erred in concluding that the beneficiary had not been and would not be performing managerial duties and would not be supervising a professional employee.

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.

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 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 initially stated that the beneficiary's job duties included "prospection," marketing, and development of the petitioner. The petitioner also provided an employment contract signed by it and the beneficiary that stated that the petitioner was to employ the beneficiary as an assistant to the president to:

> [D]evelop educational, cultural and professional programs for foreign visitors in the US. [And that the beneficiary] shall be responsible for overseeing the implementation and promotion of those programs in the US and in Europe when required for the benefits [sic] of US residents. [The beneficiary] shall also additionally render such other and unrelated services and duties as may be assigned to him [sic] from time to

time by the Company.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the tax year beginning August 10, 1999 through June 30, 2000. The Form 1120 was signed by a preparer and revealed gross receipts of $23,932, salaries paid in the amount of $15,000, and a taxable income of $599.

The director requested a more detailed description of the beneficiary's duties in the United States, including all employees under the beneficiary's direction. The director also requested the petitioner's organizational chart. The director further requested copies of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all the petitioner's employees the last four quarters. The director finally requested signed and certified copies of the petitioner's Forms 1120.

In response, the petitioner provided its organizational chart depicting a president, the beneficiary's position of marketing director/assistant to the president, an executive assistant and a secretary. The petitioner also provided a breakdown of the beneficiary's duties for the petitioner as follows:

Market Research - 45 %
Research analysis to see what programs we should market and which one is the most successful
Responsible for the market research of both the French and the US market
Monitor market feedback to position ourselves on the market and to see what programs are our best asset
Monitor competitive environment to see competitior's range of product and prices to insure that our company is competitive
Provide marketing advice and guidance to the parent company in France to ensure that the overall marketing effectiveness exceeds competition
Direct the development and implementation of international marketing

Promotion and implementation - 30 %
Direct the development of customer loyalty and retention programs through customer communication/notification (surveys, feedback...)
Plans and develops public relations and sales promotions programs with and for business partner and/or service provider
Implement the company's web site
Customer negotiations to establish contracts and exclusive right to certain segments or region
Communication with the parent company
Oversee the international marketing operation

Responsible for the supervision of personnel (clerical, administrative and middle management)

On Site Duties - 10 %
"Welcome" students at the airport upon arrival
Check them into the residence of their choice
Advise [sic] and help them with miscellaneous tasks ...
Familiarize them with the city
Assist them in the registration procedure
Translation of academic paper from French to English in order to establish equivalency to obtain transfer credits
Supervise application and registration procedure

Miscellaneous Duties - 10 %
Advise and direct the marketing department in France
Manage the area representative; advise them in selling strategies to increase the number of students
Provide training and feed back to the French staff on all our programs
Responsible for decision making: research, implementation, advertising materials, company's web site)

The petitioner also provided job descriptions for the president, executive assistant, and secretary. The petitioner further provided a copy of an unsigned IRS Form 1120 for the tax year beginning August 10, 1999 through June 30, 2000. The unsigned copy differed from the version initially presented in that the salaries paid were $33,662 and the net taxable income was at negative $18,063.

The petitioner also provided its California DE-6 Forms for three quarters of 2000. The DE-6 Forms depicted two employees the petitioner identified as the executive assistant and the secretary. The petitioner also provided separate California DE-6 Forms for all four quarters of 2000 depicting the beneficiary as an employee paid a total of $33,000 for the calendar year.

The director determined that the beneficiary would be acting as a first-line supervisor over two non-professional employees. The director also stated that it appeared the beneficiary also would be involved in day-to-day non-supervisory duties. The director concluded that the record was insufficient to establish that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary supervises a professional employee, namely the executive assistant. Counsel also asserts that this supervision is not the beneficiary's primary duty but that her primary duty is managing the company. Counsel states that the beneficiary has established the goals and policies of the petitioner, has exercised wide

latitude in discretionary decision-making and has received minimum supervision from the company's president. Counsel finally requests a finding that the beneficiary performs her duties in a managerial capacity and has supervised at least one professional.

Counsel for the petitioner does not clearly indicate whether the beneficiary claims 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. Counsel requests a finding that the beneficiary performs in a managerial capacity but also states that the beneficiary is performing certain elements found in the definition of executive capacity. The petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel's assertion that the beneficiary is primarily managing the company and is also supervising at least one professional employee 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). The petitioner initially submitted a broad position description that did not convey an understanding of the beneficiary's daily activities. In response to the director's request for evidence the petitioner provided much greater detail regarding what the beneficiary was and would be doing for the company on a daily basis. However, this detailed description is indicative of an individual primarily providing services to the enterprise such as marketing research, promotion of the company, negotiating contracts, welcoming and assisting the students upon arrival, and supervising personnel. 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). Counsel's assertion that the supervision of the executive assistant position is supervision of a professional position is not supported in the record. The description of the executive assistant's duties primarily includes translation work and developing presentation materials. Section 101(a)(32) of the Act states that the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers. Contrary to counsel's assertions, the petitioner has not provided independent evidence that a position that primarily requires translation and developing presentation material is a professional position. 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). Furthermore, the record does not establish that the supervision of the executive assistant is the beneficiary's primary duty.

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 indicative of an individual providing services to the enterprise rather than managing the enterprise. 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.

Beyond the decision of the director, the petitioner has not provided sufficient evidence that the petitioner has been doing business for at least one year prior to filing the petition.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

> *Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

We note that the petitioner was incorporated in August of 1999 and the petition was filed in October of 2000. However, beyond the incorporation of the petitioner the record does not contain evidence that the petitioner actually began doing business prior to October of 1999. The record does not contain evidence of transactions entered into prior to the year 2000.

Also beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of $42,900.

8 C.F.R 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

> permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986)(citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)); See also Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Texas 1989); K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985); Ubeda v. Palmer, 539 F.Supp. 647 (N.D.Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In the petition at hand, the petitioner has not offered signed copies of its tax returns. The unsigned tax returns submitted are inconsistent. We are unable to discern from this inconsistent information what was actually filed with the IRS and whether the petitioner had the ability to pay the proffered wage.

Finally beyond the decision of the director, the petitioner has not provided a comprehensive description of the beneficiary's duties for the overseas entity. The record is deficient in establishing that the beneficiary's duties for the overseas entity were of a managerial or executive nature.

As the petition will be dismissed for the reason stated above, these issues are 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.