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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.
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Washington, D.C. 20536

[redacted]

File: WAC 01 277 50626 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:

PUBLIC COPY

SELF-REPRESENTED

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 April 5, 1999. It is engaged in exporting nonferrous metal scrap to the Asian subcontinent and importing builder's hardware from India. 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 by the petitioner.

On appeal, the petitioner asserts that the Service's decision is 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.

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 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-

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, through its counsel stated initially that the beneficiary directed the entire operation, monitored planning, contractual commitments, personal problems and all items associated with his position as an executive or manager.

The director requested a more detailed description of the beneficiary's duties in the United States. The director also requested the petitioner's organizational chart and its California Form DE-6, Quarterly Wage Reports for all its employees.

In response the petitioner submitted the following description of the beneficiary's duties:

> Identifies purchases to be made from amongst its various metal recycling vendors for export & Builders Hardware associates for imports into the U.S.
>
> Coordinates with all the departments of its foreign & U.S. office including delegation of duties to his

subordinates.

Research and Development of new product lines for trading in the field of imports and exports.

Detailed financial planning for the future. Organizing bank lending and ensuring proper maintenance of accounts by the C.P.A.

The petitioner added that the beneficiary spent 30 percent of his time identifying sources of purchase of nonferrous metal scrap and 30 percent of his time coordinating the physical execution of this activity with the help of the manager and other employees. The petitioner also indicated that the beneficiary spent 20 percent of his time on distribution and development of the builder's hardware imported into the United States, 10 percent of his time on accounts, financial planning, traveling and consulting, and 10 percent of his time developing new products for trading.

The petitioner provided its organizational chart that depicted the beneficiary as president, an office manager, an administrative assistant, and an office assistant. The chart also included a box for freight forwarders, vendors, and an accountant. The petitioner described the office manager's position as coordinating with the freight forwarder, delegating duties to the assistants, and checking on quality control and rejections. The administrative assistant's position was described as involving delivery and safe distribution of all cargo, overseeing casual help as required and odd jobs. The office assistant's position was described as maintaining documentation related to the company, day-to-day banking, answering the phone, and coordinating meetings and travel related work of the company.

The petitioner also provided its California Form DE-6 for the pertinent quarter ending September 30, 2001. The California Form DE-6 reflected four employees in the positions described above. The petitioner also provided the first page of its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 2001. The first page of the IRS Form 1120 revealed salaries paid in the amount of $19,253 and compensation of $30,000 paid to officers. The petitioner did not include documentation of payment made to any independent contractual workers.

The director concluded that the beneficiary could not qualify as an executive because the petitioner was a small four-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 employees. The director also determined that the record did not demonstrate that the beneficiary's duties in the United States had been or would be primarily managerial or executive in nature. The director's 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, the petitioner states that it had provided the same description of the beneficiary's duties for both the overseas employer and the United States petitioner. The petitioner asserts that as the Service did not contest the beneficiary's managerial or executive status for the overseas employer, the Service must also acknowledge that the beneficiary is performing in a managerial or executive capacity for the United States enterprise. The petitioner also asserts that the Service's emphasis on the size of the company without reviewing the job description is an incomplete and inaccurate assessment of the petitioner's need for an executive. The petitioner asserts that the beneficiary is an executive and a manager as defined by the statute and regulations.

The petitioner's assertion that the Service's failure to contest the beneficiary's managerial or executive status for the overseas employer when the position for the petitioner was described in a similar fashion is not persuasive. The failure of the director to determine the nature of the beneficiary's job duties for the overseas employer, while unfortunate, does not negate the director's decision on the issue of the beneficiary's duties for the United States enterprise.

The petitioner's assertion that the director's emphasis on the size of the company without reviewing the beneficiary's job description has some merit. However, the director also determines that the record does not demonstrate that the beneficiary's duties in the United States had been or would be primarily managerial or executive in nature. Although this is a conclusory statement, it is not clear that the director is basing her determination solely on the erroneous belief that a small import and export business necessarily does not require an executive or whether she is basing her determination on the entire record, including the position descriptions. In this regard, the director should take note that in examining the executive or managerial capacity of the beneficiary, we shall look first to the petitioner's description of the job duties rather than determinations that are general and subjective and not particular to the specific case. See 8 C.F.R. 204.5(j)(5).

In examining the petitioner's job description for the beneficiary's position of president, the description itself clearly depicts a position for an individual to perform the basic operational tasks for the petitioner. It is the beneficiary as president that will identify the vendors and research and develop new product lines. 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 petitioner stated that the beneficiary will

spend 30 percent of his time identifying vendors and 20 percent of his time on distributing and developing the builder's hardware imported into the United States and 10 percent of his time developing new product for trading. These duties are not duties that relate to operational or policy management but essentially are duties relating to basic market research, obtaining products, and finding vendors who will sell the product. In addition, the beneficiary spends 30 percent of his time implementing these tasks with the help of his other employees. It is not clear from this statement that the beneficiary is delegating duties to low level employees rather than assisting in the performance of these tasks. The petitioner has not offered evidence that the beneficiary's primary duty is to direct the management of the company rather than primarily perform the operational tasks necessary to maintain the company's continued existence.

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. The managerial definition specifically excludes a first-line supervisor from being considered a "manager" under this definition unless the first-line supervisor supervises professional employees. The brief and general job descriptions for the petitioner's three other employees do not suggest that any of the petitioner's subordinate staff were engaged in positions that are professional positions. In light of the salaries paid to the petitioner's other employees based on the petitioner's IRS Form 1120 for 2001 and California DE-6 Forms, it appears that the beneficiary's other employees are part-time or low level employees at best. The petitioner's assertion that the office manager is a professional is insufficient. 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). Moreover, the Service will look at the requirements of a position when determining if the position is a professional one. The fact that the holder of a position has a college degree is irrelevant if the position itself does not require an individual with a professional degree. Upon review, the record is deficient in establishing that the positions of the petitioner's staff are professional positions.

Further, the job description for the office manager/supervisor does not specify the amount of time this individual spends on delegating duties to assistants and the amount of time that is required of this position to perform operational and administrative tasks. The placement of this individual on an

organizational chart interspersed between the beneficiary and two other employees is not sufficient in and of itself to connote managerial or supervisory status. The description of the office manager/supervisor's duties is not comprehensive and the overall record does not establish that this individual is a manager other than in title. The record does not establish that the beneficiary is other than a first-line manager of non-professional, non-supervisory, and non-managerial employees.

The petitioner's description of the beneficiary's duties is indicative of an individual performing the petitioner's essential function rather than managing the function. The duties described are not incidental to the beneficiary's position but instead are the primary duties of the position. Managers plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. In the case at hand, the petitioner has only provided evidence that it is the beneficiary who performs the major functions and work of the petitioner. The Service cannot conclude, based on the job descriptions of the petitioner's employees and the supporting tax documentation, that the beneficiary will be relieved from performing non-qualifying duties by other members of the petitioner's staff.

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 performing the operational tasks necessary to conduct the day-to-day business of the enterprise. 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 or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The petitioner has not established that the beneficiary will be employed in a primarily managerial capacity.

Beyond the decision of the director, the petitioner has submitted evidence of only one transaction 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 for one-year prior to filing the petition. The petitioner's IRS Forms 1120 are not only incomplete but do not establish in and of themselves that the petitioner was providing goods and services on a systematic basis prior to August 2, 2000.

In addition, the petitioner has submitted confusing documentation regarding its ownership. The petitioner alleges that it is

wholly-owned by an overseas entity. However, the petitioner submits two stock certificates, both issued to the beneficiary. The stock ledger submitted also indicates that the beneficiary owns 150 shares of the petitioner. To further confuse matters, the petitioner's minutes of its organizational meeting on April 5, 1999 reflect a resolution authorizing the issuance of 1000 shares of the 1000 shares of stock authorized to the overseas entity. However, in the next paragraph of this same document, a resolution authorizing the issuance of 600 shares to the beneficiary and 400 shares to another individual is also approved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). There is no consistent documentation that establishes the ownership of the petitioner. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entity, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company. The petitioner has not established this essential element of eligibility.

Further, the record does not establish that the beneficiary's employment with the overseas entity was in a managerial or executive capacity. The description of the beneficiary's job duties for the overseas entity is not sufficient to warrant a finding of managerial or executive job duties. The evidence submitted must demonstrate that the majority of the beneficiary's actual daily activities have been and will be managerial or executive in nature. From the job description provided, it appears that the beneficiary was performing operational rather than managerial or executive duties for the overseas entity.

Finally, it has not been clearly established that the petitioner has the ability to pay the beneficiary the proffered wage of $41,600. The petitioner has submitted only the first page of its IRS Form 1120 for the pertinent year of 2001. The first page indicates that officer(s) of the petitioner were compensated in the amount of $30,000. The first page of the IRS Form 1120 does not depict the name(s) of the officer(s). Furthermore, the taxable income in 2001 for the petitioner is $3,051. The petitioner has not provided evidence that it will have the ability to increase the beneficiary's salary from a possible $30,000 to that of $41,600 with the current income of the petitioner.

For these additional reasons, the petition may not be approved.

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.