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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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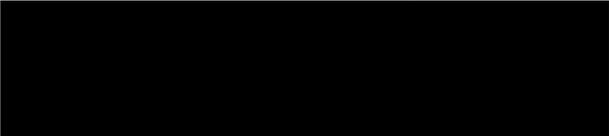


File: WAC 00 107 53057 Office: CALIFORNIA SERVICE CENTER Date: JAN 31 2003

IN RE: Petitioner: [Redacted]
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

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 is dismissed.

The petitioner is a corporation organized in the State of California in 1998. It is engaged in the business of selling Kirby vacuum cleaners. 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 its ability to pay the proffered wage. The director also determined that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Service misapplied the law to the facts of the case. Counsel also asserts that the Service is engaged in rule-making by categorically excluding businesses that operate using commissioned sales staff. Counsel does not submit a brief or other evidence on appeal.

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 first issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage.

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.

The petitioner indicated on the Form I-140 that it intended to pay the beneficiary a salary of \$48,000 per year. The priority date for this petition is February 28, 2000. The petitioner initially provided an income statement for the year 1999 reflecting a total net income of \$11,141.90. The statement is unaudited and does not adequately explain how the petitioner's employees are compensated.

On August 25, 2000, the director requested the petitioner's latest Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return or copies of the petitioner's latest audited corporate financial statements as evidence the petitioner had the ability to pay the beneficiary the proffered wage.

In response, the petitioner provided its IRS Form 1120 for the year 1999 for its fiscal year beginning August 1, 1999 and ending July 31, 2000. The IRS Form 1120 revealed gross receipts in the amount of \$292,578, taxable income of \$5,791 and that no compensation had been paid to officers and that no salaries or wages had been paid. The petitioner also provided an unaudited profit and loss statement covering the time period of October 1999 through August 2000. The unaudited statement revealed net income of \$14,048.48 after deducting among other things, \$113,946.83 for consulting fees.

The director subsequently sent a notice of intent to deny the petition again questioning the petitioner's ability to pay the proffered wage.

In response to the notice of intent to deny, counsel for the petitioner provided an unaudited balance sheet and unaudited profit and loss statement for the year 2000. The profit and loss statement contained notations that the petitioner had paid \$80,260.79 to the beneficiary and to another individual in that year and \$79,095.62 to sales associates. Counsel asserted that the petitioner was a profitable company and that the employees worked on commission.

The director determined based on the record that the petitioner had not established its ability to pay the proffered wage. Counsel has submitted no evidence that would overcome the director's decision on this issue.

The petitioner has not submitted independent evidence of its ability to pay the beneficiary the proffered wage. Counsel's assertions and unaudited profit and loss statements are not sufficient to establish the petitioner's ability to pay the proffered wage. 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). Upon review, the petitioner has not established its ability to pay the proffered wage.

The second 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-

- 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 submitted a brief description of the beneficiary's duties as follows:

As President, [the beneficiary] is to be responsible for ensuring the achievement of all financial, business, and strategic goals and objectives for the U.S. operation by directing, coordinating, and administering all aspects of sales, service, operations, and support. [The beneficiary] will train, promote, and field counsel both management and sales staff on an on-going basis.

The director requested more detail on the beneficiary's daily duties and further information on how the duties were managerial or executive in nature.

In response, the petitioner stated that the beneficiary supervised all five departments of the petitioner, (personnel, leads, service, sales, and accounting) and was available daily to exercise direction, including running the sales meetings, assigning the leads and field locations, and working daily in the field with several Sales Associates. The petitioner also noted that the beneficiary daily conducted educational and motivational

seminars, processed the contracts that were turned in, handed out new leads for the day, assigned sales associates and field locations, trained new employees and contractors, and submitted new contracts to the financing company.

The director in a notice of intent to deny determined that the beneficiary was in actuality a first-line supervisor of non-professional employees. The director stated that the petitioner's type of business would require the beneficiary to be involved in the day-to-day non-supervisory duties that are commonplace in the industry. The director also stated that the employees were considered non-professional because their duties involved sales and the sales industry did not require professional employees.

Counsel for the petitioner in response to the notice of intent to deny, asserted that the beneficiary's primary function was to run the business. Counsel also asserted that the beneficiary "is in direct control of his subordinates," and that he "makes policy decisions, exercises discretion and performs key managerial functions." Counsel also re-stated portions of the definition of "executive capacity" and concluded that the beneficiary's duties and responsibilities squarely fit within the definition.

The director determined that the petitioner's business was an industry that did not involve or require "professional" employees. The director also reasoned that given the petitioner's type of business, it was unreasonable to believe that the beneficiary would not be involved with the day-to-day non-supervisory duties that are commonplace within the sales industry. The director concluded that based on the evidence submitted, the petitioner had not established that the beneficiary had been or would be employed in a primarily executive or managerial capacity, or that the petitioning organization required an executive or managerial position.

On appeal, counsel for the petitioner asserts that the Service misapplied the law to the facts of the case. Counsel also asserts that the Service is engaged in rule-making by categorically excluding businesses that operate using commissioned sales staff.

Counsel's assertion that the Service misapplied the law to the facts of the case and is engaged in rule-making is not persuasive. However, we note the director's statements regarding the type of the petitioner's business and the director's blanket conclusions regarding the industry. In this particular case the director did not misapply the law to the facts but rather neglected to adequately address the deficiencies of the petitioner's position descriptions contained in the record.

The petitioner provided job titles and general position descriptions for all of its employees. The petitioner's descriptions however, do not suggest that any of the petitioner's subordinate staff were engaged in positions that are professional

positions. Because the regulations do not provide a definition for a "professional position" for a petition filed pursuant to section 203(b)(1)(C) of the Act, we will look at the definition of "profession" found in the Act itself. 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. This provides some guidance on the type of position that the Service should be considering as a professional position.

The petitioner's organizational chart provided in response to the director's notice of intent to deny, showed the beneficiary as president as well as being in charge of the accounting department. The chart also reflected a person in charge of personnel and sales, a person in charge of leads, several sales associates, and an indication that the service department was sublet to an outside contractor. The personnel and sales person's duties are described as recruiting sales personnel and training the personnel. The person in charge of leads has duties including recruiting and training phone solicitors, handling mail, and assuring an adequate amount of vacuum demonstrations. The beneficiary's duties for the accounting department include preparing the weekly payroll, tax payments and government reports, and daily financial and inventory reports. Although the director's statement that the sales industry as a whole does not require professional employees is over broad, the record of this particular case does not demonstrate that the beneficiary supervises professional employees. Positions for individuals in charge of recruiting and training sales personnel and setting up vacuum cleaner demonstrations may require individuals with knowledge of the particular product but do not necessarily require individuals with a high degree of education. The professional positions provided as examples in the Act are all positions that require degrees. The Service cannot conclude from the information contained in the record that the beneficiary supervises professional employees.

The director's statement regarding the beneficiary's role in a sales company with the conclusion that it would be unreasonable to believe that the beneficiary would not be involved with day-to-day non-supervisory duties is subjective and does not adequately address the deficiencies of the record. 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's description of the beneficiary's job duties both as president and as the accounting person are indicative of an individual primarily providing services to the company. 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 states that the beneficiary's daily duties include conducting educational and motivational seminars, processing

contracts, handing out new leads, assigning sales associates and field locations, training new employees and contractors, and submitting new contracts to the financing company. These duties relate to the performance of the operational activities of the company including supervision of lower level employees. The petitioner has not submitted evidence that a majority of the beneficiary's duties relate to operational or policy management of the company.

Counsel's re-statement of the definition of "executive capacity" along with the conclusion that the beneficiary performs all these elements is not sufficient. Re-stating these elements does not convey an understanding of the beneficiary's daily executive activities for the company. The petitioner's statements that the beneficiary "runs the company" and is responsible for "ensuring the achievement of all financial, business, and strategic goals and objectives for the U.S. operation by directing, coordinating, and administering all aspects of sales, service, operations, and support" are vague and general in nature. The petitioner's information regarding the beneficiary's daily duties as noted above, is much more specific and confirms that the beneficiary is actually performing the necessary operational tasks for the petitioner.

The petitioner has not provided sufficient evidence that the beneficiary primarily performs in a managerial or executive capacity as contemplated by the statute. The position descriptions provided reveal that the beneficiary supervises non-professional, non-managerial, and non-supervisory personnel and primarily performs the operational tasks of the petitioning entity.

Beyond the decision of the director, the petitioner has not provided sufficient information to determine that the beneficiary's duties for the foreign entity were of a managerial or executive nature. As the petition will be dismissed for the reasons stated above, this issue is not examined further.

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.