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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]

JAN 31 2003

File: [redacted] Office: VERMONT SERVICE CENTER Date:

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, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of New Jersey in 1997. It is engaged in the operation of a Chinese travel tour agency. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, it 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 had been or would be employed in a primarily executive or managerial capacity or that the petitioner could support such a position.

On appeal, counsel for the petitioner asserts that the director'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):
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> * * *
>
> (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.

The issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity.

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;
>
> 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;
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> 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 described the beneficiary's duties as "having full responsibility for the administration of the U.S. Company inclusive of all the executive duties that entails." The petitioner also provided a breakdown of the beneficiary's duties as follows:

> 50% of the President's time is spent working with special corporate accounts and other travel agencies, which require high level negotiations, and decision-making authority, which only she possesses. She spends approximately 25% of her time on other administrative duties including banking and finance, reviewing sales results, and administering her staff. She spends the balance of her time in planning sales and marketing strategies, and preparing reports for the Parent Company in China to review.
>
> Her full spectrum of duties and authority include all of the following: She has full leeway to decide how to utilize the investment funds of the company including discretionary authority on budget distribution of funds, staff remuneration, rent costs, banking arrangements, legal expenditures, discount and refund policy and decisions, and all other finance related aspects of the operation. It is her signature which is authoritative at the bank and on the company's lease, and it is her authority alone which authorizes travel payments and orders, and is used to bind the company in legal agreements with other travel agencies for reciprocal arrangements to sell tours. She has the sole responsibility to set a program for the Sales and Marketing Coordinator and to decide if it has been met. It is also her responsibility to work directly with the Consulate of the People's Republic of China to secure hundreds of visas for the participants in the tours the U.S. Company sells. Only she has the authority to work directly with the Chinese Consulate on governmental matters of this nature. She is the one who decides on a final advertising budget and program, and on what monies to expend in those efforts. As the CEO of [the petitioner], [the beneficiary] is the only [sic] who is accountable to [the parent company] in China for overall corporate performance and for long term profit and loss. [The beneficiary] is also the sole person to work with the largest corporate accounts that require special negotiation and authorization for unusual group

> discounts. It is also her final decision as to which other travel agencies the U.S. Company will contract with and what the nature and requirements of those contracts will be.

The petitioner also noted that it employed two sales account executives, one sales and marketing coordinator, and an administrative assistant and salesman.

The director requested additional evidence that the beneficiary had been and would be engaged in a primarily managerial or executive position with the United States entity.

In response, counsel for the petitioner stated that the beneficiary directed its management indicating that the beneficiary "had final authority over a staff of four, three of whom are professionals. One of these professionals is also a 'manager'." Counsel also noted that the beneficiary had final dispensation authority with regard to all financial matters and legal matters. Counsel also stated that the beneficiary had been the primary executive in charge of developing the goals and policies of the company and that her planning resulted in an increase in sales and profits. Counsel further stated that the beneficiary had wide latitude in discretionary decision-making as the sole authority in the United States to dispense the company's funds. Counsel finally noted that the beneficiary received only limited supervision from the parent company and then only in respect to meeting the goals initially set out by the parent company.

The petitioner also through its counsel set forth descriptions of the duties of the petitioner's four other employees. Counsel described the sales and marketing manager position as including planning and implementing marketing and sales programs identifying potential markets, interacting and negotiating with corporate and individual clients, developing travel programs and supervising and managing the schedules and work load of the account executives and sales aspects of the administrative assistant's position. Counsel indicated the sales account executive positions included duties of developing new accounts and processing travel business for individual accounts and that the administrative assistant position duties included handling clerical needs and assisting with the sales functions.

The petitioner in a letter signed by the managing director of the petitioner's parent company also provided a description and breakdown of the duties of the petitioner's employees. The managing director of the parent company on the petitioner's letterhead described the beneficiary's duties as spending twenty or more hours per week working with special corporate accounts and other travel agencies; spending another ten to fifteen hours per week directing fiscal and administrative matters; and, the balance of the week (ten to twenty hours) responding to correspondence,

preparing progress reports, meeting with the sales and marketing coordinator and networking with other individuals from other travel agencies. The letter also indicated that the administrative assistant handled the company's clerical and data processing requirements as well as handling sales calls. The letter further indicated that the sales and marketing coordinator spent approximately twenty-five hours working and negotiating with corporate and individual clients and supervising the two sales executives; spent another four or five hours working out the logistical and financial details in putting together travel arrangements for large groups; and, the balance of the work week working with the beneficiary and receiving direction on handling certain accounts and developing an advertising plan. It was finally indicated that the sales account executives spent approximately thirty hours working directly with accounts and soliciting new accounts; and, the balance of the work week working with the sales and marketing coordinator on special projects and processing sales.

The director determined that the record did not demonstrate that the beneficiary had been or would be employed in a primarily executive or managerial capacity, or that the organization could currently support such a position.

On appeal, counsel for the petitioner asserts that the director's decision was in error because it ignored the record evidence as a whole. Counsel also asserts that contrary to the opinion of the director, the organization is functioning at a level that requires the services of an executive. Counsel further asserts that the director's decision violates section 101(a)(44)(C) of the Act. Counsel finally asserts that the director failed to analyze whether the beneficiary qualified as performing in an "executive capacity" or "managerial capacity."

Counsel's assertions are 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, the managing director of the petitioner's parent company, and counsel have provided detailed and fairly consistent descriptions of the beneficiary's duties for the petitioner. However, the duties indicate that the beneficiary is primarily providing travel services to corporate clients. She also is engaged in promoting the travel agency through networking and other marketing endeavors that may result in contractual agreements. The beneficiary also provides necessary administrative and financial functions such as securing visas for tourists, travel payments, and orders. The majority of the duties described indicate that the beneficiary is primarily 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). Counsel's description of the beneficiary's duties provided in response to the director's request for evidence attempts to isolate certain of the beneficiary's functions as examples of her carrying out executive duties as found in section 101(a)(44)(B). Counsel states that the beneficiary directs the management of the company and notes that she directs four employees. However, the beneficiary's time is allocated primarily to working with corporate clients, meeting with the bank and accountants, responding to correspondence, and networking with other travel agents. It does not appear the beneficiary spends a significant portion of her time with the sales and marketing coordinator reviewing sales and proposals, and discussing the performance of the sales executives. Counsel also notes that the beneficiary is the sole authority in dispensing funds and binding the company in legal matters and cites this responsibility as evidence that she directs the company. However, the authority to bind a company through legal agreements does not necessarily indicate the beneficiary is directing the management of the company. Rather, having the authority to bind the company simply recognizes that the beneficiary is acting as an agent for the company. The fact that the beneficiary provides this service for the company does not result in a conclusion that the beneficiary is primarily directing the management of the company. Counsel has not adequately explained how acting as an agent for a company and having the authority to bind the company through legal agreements takes up a significant portion of the beneficiary's time. Again, according to the breakdown of the beneficiary's weekly duties, the beneficiary spends the majority of her time making travel arrangements for corporate clients and engaging in marketing and networking duties.

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. Failure to establish that the beneficiary is primarily assigned to perform any one of the elements results in the failure to establish that the beneficiary is eligible for this classification.

As noted above, the petitioner failed to establish that the beneficiary primarily directs the management of the organization. Instead she primarily handles corporate accounts as does the sales and marketing coordinator. Her additional responsibilities include networking, marketing the tours to other travel agencies, and dealing with administrative matters. The petitioner has not adequately established that these duties are primarily executive duties rather than the provision of basic services to the petitioner. The petitioner has not established that the beneficiary spends a significant portion of her time establishing

the goals and policies of the petitioner. Although the beneficiary appears responsible for some decision-making as it relates to the type of tours to offer and the necessary deals to make with other agencies, again the decision-making and any resulting goals or policies that are established arise from the performance of the basic operation of this tourist agency. Likewise, even though the beneficiary receives only general supervision and is responsible for the success or failure of the petitioner's tours, the beneficiary's assignment is to develop tours to China.

The petitioner has also failed to demonstrate that the beneficiary primarily manages the organization or a function of the organization. Contrary to counsel's assertion that the record clearly demonstrates that the beneficiary manages a number of essential functions, the essential functions of the organization are not detailed. 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). Neither the petitioner nor counsel has described how the beneficiary's tasks in regard to the essential functions of the petitioner are managerial in nature rather than the execution of the tasks associated with the "essential function." Counsel's one example of an essential function is that the beneficiary manages personnel. However, the petitioner has not described this duty as a primary duty of the beneficiary. The petitioner also has not demonstrated that the beneficiary primarily manages professional or managerial or supervisory personnel. Counsel's assertion that the record demonstrates that a travel agent that has knowledge of a certain culture would require a bachelor's degree is not supported in the record. Most positions for travel agents require a high school diploma. The petitioner has not shown a necessity for further education for its travel agent positions.

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 description of the duties to be performed by the beneficiary does not sufficiently 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 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.

Although it appears the director based his decision partially on the size of the enterprise, it is not clear that the director considered the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, 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.

At the time of filing the petitioner was a three-year-old travel agency that stated it had gross receipts in the amount of $880,708. The petitioner employed the beneficiary as president at a salary of $39,996. The petitioner also employed a sales and marketing coordinator, two travel agents, and an administrative assistant/salesperson with a combined salary of $54,841. The petitioner has not provided sufficient information to establish how its employees at the salaries described could realistically generate this yearly income without the beneficiary's significant contribution to the provision of services to the petitioner. Based on the petitioner's lack of information on this issue, it is not possible to determine if 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 executive or managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

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.