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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 00 258 52273 Office: CALIFORNIA SERVICE CENTER Date: JAN 31 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]

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 organized in the state of California that is engaged in the business of automotive wholesale, trading, and transport. It seeks to employ the beneficiary as its president. 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 would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner has provided documentation to support that the beneficiary is a multinational executive.

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.

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 stated the duties of the position as follows:

> Plans, develops and established [sic] policies and objectives of the business; Responsible for contract negotiations, amending and formulating company policies and managing the financial affairs of the company; Makes recommendations on improving profitability and exercises a wide latitude of discretionary decision making powers reporting to no one since [the beneficiary] is the President and owns a majority of the shares; Reviews activity reports and financial statements to determine growth of business and revises objectives and plans in accordance with conditions.

The petitioner further stated that the beneficiary's duties included the following:

> [The beneficiary] has directed the establishment of the U.S. company and exercises total control in discretionary decision-making, particularly in regard to the hiring of managers, marketing and accounting professionals and establishing company policies and procedures. He oversees the management and staffing of the facility is [sic] continuing to establish a clientele base. [The beneficiary] has full autonomy in decision making regarding personnel positions, including hiring, firing and any required disciplinary action. [The beneficiary] formulates company financial and business goals and develops business strategies. He develops marketing strategies to increase business, investigate [sic] new markets and acts as a liaison with the home company.

The petitioner also provided its 1999 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The Form 1120 revealed gross receipts in the amount of $296,182 and that no compensation was paid to officers and that $75,588 was paid in salaries.

The director requested that the petitioner provide a more detailed description of the beneficiary's duties indicating the percentage of time spent on each of the listed duties. The director also requested that the petitioner provide copies of its California Form DE-6, Quarterly Wage Reports for its employees. The director further requested the petitioner's organizational chart.

In response, the petitioner provided the following breakdown of the beneficiary's duties for the United States company:

> 20% - Planning and establishing business policies and objectives

20% - Contract negotiations
30% - Reviewing activity & financial reports to determine growth and exercising decision making powers
15% - Developing marketing strategies
15% - Overseeing management

The petitioner also provided its organizational chart depicting the beneficiary as president, two sales representatives, one accounting person, and four drivers, all directly under the beneficiary's supervision. The petitioner also listed six employees, their salaries, and job titles. The list included one less driver than depicted on the petitioner's organizational chart. The beneficiary's California DE-6 Form for the quarters ending September 30, 2000 and December 31, 2000 corresponded with the petitioner's organizational chart.

The director determined that the beneficiary would be performing as a first-line supervisor of seven employees. The director determined from the California DE-6 Forms submitted that the accounting position was a part-time position and that the salaries depicted on the California DE-6 Forms did not completely correspond to the salaries listed on the petitioner's employee's list. The director concluded that petitioner had not established that the beneficiary's duties had been or would be primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the documentation submitted demonstrates that the beneficiary has satisfied all the requirements in order to obtain approval as a multinational executive. Counsel asserts that the petitioner is a medium sized company that requires an executive to run operations and not just a first-line supervisor. Counsel asserts that the beneficiary is managing a subordinate staff of professional, managerial, or supervisory personnel who relive him from performing non-qualifying duties. Counsel finally asserts that staffing levels are immaterial, citing Section 101(a)(44)(C) of the Act and two cases.

It is noted that counsel continuously states that the beneficiary is performing in an executive capacity yet borrows liberally from the definition of both managerial capacity and executive capacity when describing the beneficiary's position. Section 101(a)(44)(A) and 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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.

Counsel's assertion that the description of the beneficiary's job duties clearly establishes that the beneficiary is a multinational executive 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 has submitted a broad position description that refers, in part, to duties such as "[p]lans, develops and established [sic] policies and objectives of the business," and "formulates company financial and business goals and develops business strategies," and "[r]eviews activity reports and financial statements," and "amend[s] and formulate[s] company policies and manage[s] the financial affairs of the company." Furthermore, the position description states that the beneficiary is responsible for "direct[ing] the establishment of the U.S. company and exercise[ing] total control in discretionary decision-making." This statement merely paraphrases elements of the statutory definition of "executive capacity" without describing the actual duties of the beneficiary with respect to the daily operations. The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities.

In addition, many of the beneficiary's duties are more indicative of an individual performing necessary basic operations for the petitioner. For example, the position description indicates that the beneficiary is "[r]esponsible for contract negotiations," and "develops marketing strategies to increase business, investigate [sic] new markets and acts as a liaison with the home company." The petitioner does not provide evidence that these duties are carried out by others and are only directed or supervised by the beneficiary. Rather, it appears that the beneficiary is performing non-managerial functions that relate to marketing and obtaining new business. 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 response to the director's request for evidence does not provide further detailed information on what the beneficiary does in his daily activities. Although the petitioner provided a breakdown of the beneficiary's duties, the duties described are vague and do not convey an understanding of what the beneficiary does on a daily basis. The petition failed to provide evidence that demonstrates that the beneficiary directs or manages the enterprise.

Counsel's assertion that the petitioner requires an executive to run operations and manages a professional, managerial, or supervisory staff is not supported in the record. 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). The petitioner has not provided evidence that any of the staff is employed in a managerial, supervisory, or professional capacity. The petitioner's organizational chart reveals that all employees report directly to the beneficiary. As determined by the director, the record reveals that the beneficiary is engaged in first-line supervisory duties over non-professional, non-managerial, and non-supervisory employees.

Counsel's assertion that staffing levels are immaterial when determining managerial or executive capacity is inaccurate. The staffing levels of an enterprise may be considered but require that the Service take into consideration the reasonable needs of the organization in light of the overall purpose and stage of the organization. Section 101(a)(44)(C) of the Act. This same section also specifically indicates that an individual shall not be considered to be acting in a managerial or executive capacity on the basis of the number of employees that the individual supervises and directs. So that the number of employees under the supervision of a beneficiary may be considered as a factor in determining managerial or executive capacity but an individual whether supervising a small or large number of employees is not necessarily a manager or executive.

In the case at hand, the petitioner is a four-year-old automotive wholesale, trading and transporter of vehicles with an annual income of $296,182 in 1999 and $313,368 in 2000. The petitioner employed the beneficiary as president and a part-time accountant, two sales representatives, and three or four drivers. The salaries, titles, and job descriptions provided for these individuals do not reflect that the individuals are employed in a managerial, supervisory, or professional capacity. The petitioner's description of the company does not provide a clear understanding of the scope of the company. As such it is not possible to determine if the reasonable needs of the company might plausibly be met by the beneficiary and the staff on hand at the time of filing. Regardless, as noted above the reasonable needs of the petitioner serve only as a factor when reviewing the claimed managerial or executive duties. 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.

Counsel citation to Mars Jewelers Inc. v. INS, 702 F. Supp. 1570 (N.D. Ga., 1988), is not persuasive. First, this case does not concern a claim as a multinational manager or executive under section 203(b)(1)(C) of the Act. Second, although there is some confusion on the issue, the petitioner and counsel continuously refer to the beneficiary's position as an executive one rather than a managerial position. Mars Jewelers Inc. concerns a managerial position and a managerial position defined under the previously enacted regulations of 1983 and not the regulations

enacted in 1987. Counsel's citation to other unpublished decisions is also not persuasive. Unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

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 general in nature and are more indicative of an individual providing services to the enterprise rather than managing or directing 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 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 has been employed in either a primarily managerial or executive capacity.

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.

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