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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: [redacted] Office: NEBRASKA 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, Nebraska Service Center[1]. The matter is now before the Associate Commissioner for Examinations on appeal. The case will be dismissed.

The petitioner is a corporation organized in the State of California in 1996. It is engaged in the business of importing toys. It seeks to employ the beneficiary as its vice-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 without requesting additional evidence that the petitioner had not established that the beneficiary had been or would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary's job duties require him to perform in a managerial/executive capacity and that the beneficiary does not engage in performing day-to-day functions. Counsel further asserts that the beneficiary manages a function for the petitioner. Counsel also submits the petitioner's California DE-6 Form, Quarterly Wage and Withholding Report for the pertinent time period and further evidence in the form of brief descriptions for the positions of the petitioner's employees.

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

[1] We note for informational purposes only, that the initial filing of the petitioner's I-140 employment based petition appears to fall within the jurisdiction of the California Service Center. However, ultimate administrative review of the Service's decisions on I-140 petitions lies with the Associate Commissioner for Examinations and as the appeal was properly filed, the appellate process will continue.

> 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 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.

In a letter supporting its petition for classification of the beneficiary as a multinational manager and executive the petitioner submitted a general description of the beneficiary's position as follows:

> [The beneficiary] will continue to hold the position of Vice President (the position he has held in L-1 Status since August 1999) and will control, direct, manage all aspects of corporate operation, including developing and implementing corporate marketing plan, financial operations, hire/fire/train staff; attend trade shows . . .
>
> [The beneficiary] has played a pivotal role in new product sourcing and expansion of vendor relationships. His attendance at trade shows as our Vice President has greatly benefited our company. He develops and implements corporate policies and protocols and exercises wide latitude in day to day decision making.
>
> As the senior executive officer based in the U.S., he is also responsible for directing and managing financial operations, including coordination and synchronization of financial systems for both the U.S. and Canadian operations, and directing and managing office/warehouse operations.

The petitioner also provided the beneficiary's resume indicating that the beneficiary was the president of the petitioner and had performed and was performing the following:

- Incorporated [the petitioner]
- Purchases toys from the international wholesalers
- Distributes toys in both local and Latin American markets
- Attends trade shows in US, Hong Kong and mainland China

The petitioner further provided its organizational chart depicting the beneficiary as president/treasurer, an administrator, a warehouse manager, and a generic description of "employees." The petitioner also submitted its California DE-6 Form, Quarterly Wage and Withholding Report for the first quarter of 2000. The report reflected three employees, including the beneficiary. The petitioner also submitted its IRS Form 1120, U.S. Corporation Income Tax Return for the year 1999. The IRS Form 1120 revealed $6,366,615 in gross receipts, compensation of the beneficiary as an officer in the amount of $25,000, salaries paid in the amount of $24,000, and taxable income in the amount of $25,712.

The director based his decision on the petitioner's IRS Form 1120. The director determined from the tax return that "the beneficiary lacks a subordinate staff of professional, managerial or supervisor personnel who relieve the beneficiary from performing non-qualifying duties." The director concluded that the beneficiary would be performing the day-to-day functions of the petitioner and would not be performing in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary manages the essential function of importing toys to be distributed. Counsel also notes the failure of the Service to request further evidence and submits additional evidence including more detailed information on the beneficiary's duties and responsibilities as well as information on the duties and responsibilities of the two subordinate employees.

Counsel states that the petitioner advised that the beneficiary spent most of his workday as follows:

> [R]eviewing market data, identifying and analyzing current toy trends, making purchase plans based upon his analysis, locating and negotiating with potential toy vendors for the purpose of securing contracted product, identifying potential purchasers, conducting negotiations with purchasers, making final decisions about contracts. He is solely responsible for overseeing purchase and import plans by making final decisions about engaging suppliers as well as negotiating lareg-scale [sic] purchase agreements. He is also responsible for ensuring corporate compliance with all federal and state regulations and foreign regulations relating to import/export of toys.

> He also spends his time on developing corporate protocols and procedures: these protocols and procedures are critical when dealing with U.S. import/export regulations. . . . The beneficiary also spends part of his day directing the two supervisory employees.

Counsel also stated that the office administrator/accounting position involved general bookkeeping, tracking accounts payable and receivable, providing the beneficiary with basic market research data, and acting as a receptionist. Counsel further stated the duties of the warehouse manager as including tracking inventory, receiving and shipping goods, hiring and supervising subcontractors, and maintaining the toy showroom.

Upon review, 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 description initially provided is indicative of an individual performing the basic operational tasks necessary to continue the petitioner's business of importing toys for distribution. 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 beneficiary develops and implements the petitioner's marketing plan and financial operations, attends trade shows, and expands vendor relationships. This description implies that the beneficiary is responsible for handling these duties rather than managing these tasks through the work of others. It is not possible to determine from the general description provided that the beneficiary will be primarily performing managerial or executive duties in relation to these tasks rather than actually performing the tasks.

We also note that the petitioner appears to employ the use of titles indiscriminately. The letter in support of the petition and the Form I-140 both refer to the beneficiary's position as vice-president. However, the beneficiary's resume and the petitioner's organizational chart depict the beneficiary to be the president of the petitioning entity. 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).

Counsel's supplementary statement that the beneficiary reviews market data, makes purchase plans, identifies and negotiates with potential toy vendors and potential purchasers confirms that the beneficiary is the principal employee of the petitioner performing the day-to-day operational tasks of the petitioner. Counsel's

supplementary description of the duties of the petitioner's remaining two employees does not dispel this conclusion. The office administrator provides basic bookkeeping services and provides basic research data. She does not make the purchases or identify and negotiate with the toy vendors or purchasers. She is not responsible for ensuring corporate compliance with governmental relations relating to the import and export of toys. The duties of the warehouse manager and the beneficiary appear to overlap in that the petitioner indicates that both are responsible for managing the office and warehouse operations.

In addition, the petitioner has not provided evidence supporting counsel's statement that the warehouse manager supervised subcontractors. 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 only provided supporting evidence that it employed the three individuals listed on the California DE-6 Form.

Further, although it appears that the director was merely stating his opinion when concluding that the low amount paid in salaries indicated that the petitioner did not employ sufficient subordinate employees to relieve the beneficiary from performing non-qualifying duties, counsel's response to this conclusion is not persuasive. Counsel's response asserting that the two subordinate employees relieve the beneficiary from performing the day-to-day functions is again not supported by the evidence in the record. The record demonstrates the petitioner grossed $6,366,615 in 1999 and employed only three individuals during that time period. The descriptions provided for the two subordinate employees do not reflect that either of these individuals had sales responsibility. The beneficiary is responsible for locating and negotiating with potential suppliers and toy vendors. He is the individual generating the sales revenue for the company. The beneficiary is performing the primary function of the petitioner and is not managing the function. As noted above, an individual who primarily provides services to an organization is not managing the organization in the context of the managerial definition found in the Act. Matter of Church Scientology International, supra.

Counsel's reference to an unpublished decision is noted. However, counsel has not furnished evidence to establish that the facts of this case are analogous to those in the referenced unpublished decision. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

Upon review, the record before the director was insufficient to demonstrate that the beneficiary will be 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 beneficiary's job duties is

general and is more indicative of an individual performing the sales function of the petitioner. 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 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 or will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not provided consistent information that a qualifying relationship exists between the petitioner and the claimed foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas entity. The petitioner in this instance states that it is owned in the same proportion and by the same individuals who own the foreign entity. The petitioner states that three brothers own its outstanding stock. However, the petitioner provides four stock certificates issued to four different individuals all in the amount of 5000 shares. The information provided regarding the petitioner's ownership and control is inconsistent. Inconsistencies must be resolved by independent objective evidence. Matter of Ho, supra.

As the petition is dismissed for the reason stated above, this issue is 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.