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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

APR 17 2003

File: EAC 01 270 52206 Office: NEBRASKA SERVICE CENTER Date:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1998 in the State of New York and is claimed to be a subsidiary of [redacted] located in Israel. The petitioner is engaged in the business of buying, selling, and renting real estate. It seeks to employ the beneficiary as its general manager. 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 that the beneficiary's duties in the United States are primarily managerial or executive.

On appeal, counsel provides a further explanation of the beneficiary's duties in the United States and refutes the director's adverse findings.

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

which 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 beneficiary has been and will be performing managerial or executive duties.

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 the initial filing, the petitioner described the beneficiary's prospective duties as follows:

1. Direct and oversee the day-to-day operations of the company;
2. Direct the formulation and implementation of the company's strategy in acquiring customer base.
3. Supervise employees as follows:
   a. Project Manager - coordinates projects pertaining to electrical, construction and development; advise clients on progress of projects, prepare project reports.
   b. Real Estate Manager - monitor vacant properties and units for rental purposes, advertise vacant units and properties; show unit and properties to interested customers; prepare contracts.
   c. Property Manager - supervise building employees, monitor and ensure day-to-day maintenance of all buildings, coordinate periodic inspection of buildings.

On November 13, 2001 the Bureau sent the petitioner a notice requesting additional evidence, including an hourly breakdown of time the beneficiary spends performing each of his duties on a weekly basis.

In response to the above request, the petitioner submitted the following description of the beneficiary's duties:

a. Direct and oversee the day-to-day operations of the company. The beneficiary devotes in excess of 20 hours per week in performing this task as the entire scope of business operations of the United States entity is dependent on his formulation of company policies and procedures, making major decisions pertaining to choice of consultants and suppliers, review of financial statements, meeting with company lawyer and accountant, review of agreements for acquisition of real estate properties, hiring and firing of employees.

b. Direct the formulation and implementation of the company's strategy in acquiring customer base. The beneficiary devotes in excess of 10 hours per week in this duty. The job requires wide knowledge of human relations and marketing principles covering promotion and advertising issues, review of agreements for the

acquisition of real estate properties, negotiations with banks to obtain financing for prospective purchase of real estate properties, and direct the functions of the Sales and the Purchase departments.

c. Supervising the following managers in which the beneficiary spends in excess of 10 hours per week: The beneficiary meets with these managers on a weekly basis in order to monitor their performance. . . .

The director denied the petition noting that the petitioner appears to have "inflated" the beneficiary's duties for the purpose of meeting the statutory requirements for the definition of "manager." The director concluded that the petitioner failed to submit sufficient evidence that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve him of having to perform non-qualifying duties.

On appeal, counsel submits a statement explaining that the petitioner needs to have a purchase and sales department because the core of its business is both buying and selling real estate. Counsel further explained that each department will eventually experience an increase in personnel once the petitioner "has reached its financial goal." In an attempt to clarify the beneficiary's role with the petitioning organization, counsel provides the following supplemental description of the beneficiary's daily duties:

> [P]art of the beneficiary's duty is to direct the formulation and implementation of the company's strategy in acquiring customer base. The beneficiary meets with people everyday, such as executives of companies who are prospective buyers or sellers of real estate properties. The beneficiary is in charge of marketing. Marketing covers a wide range of responsibilities which include direct interaction with individuals or using advertising vehicles such as the print and the television media. . . .

The above description of the beneficiary's duties clearly conveys the notion that the petitioner is still in the beginning stages of operation which explains why the beneficiary is called upon to meet with potential clientele and handle the petitioner's marketing concerns. While these duties may be necessary for the smooth operation of business, they cannot be considered managerial or executive. Rather, these are the daily operational tasks that would normally be performed by sales representatives and marketing specialists, not by someone in a managerial capacity. 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).

Furthermore, section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Based on these definitions it cannot be concluded that the beneficiary supervises subordinates who are professional as none of their job descriptions indicate that anything other than job experience is necessary to perform their jobs. The beneficiary's subordinates also cannot be considered managers or supervisors merely because they carry managerial titles. Rather, their respective job descriptions indicate that these employees help the beneficiary carry out the essential functions of the petitioner's business. However, as the beneficiary is still required to handle the petitioner's marketing concerns and directly meet with clients, the subordinates he supervises do not relieve him from having to perform non-qualifying duties.

While counsel repeatedly points out on appeal that the petitioner expects to expand its personnel once it becomes more financially secure, the fact remains that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Upon review, the description of the beneficiary's job duties lead the Bureau to conclude that the beneficiary is performing as a professional or "staff officer," but not as a manager or executive. The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. As stated above, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from having to perform non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason the petition cannot be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.