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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

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass. 3/F
Washington, D.C. 20536

[redacted]

APR 18 2003

File: [redacted] Office: CALIFORNIA 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)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was approved by the Director, California Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in California in March 1998. It is engaged in importing and exporting metal molding and imitation pieces used in the garment and fashion industry. 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 initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the director's revocation decision was 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):
>
> * * *
>
> (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 issue in this proceeding is whether the beneficiary will be employed in an executive or managerial capacity 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-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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
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> 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 stated the beneficiary's duties for the petitioner had been and would be as follows:

> [D]irect the overall management, especially the overall business development decision making and goal setting; exercise discretionary decision over the personnel management, development plans, budget review and approval, and other executive/managerial decision [sic]; represent the company in all formal business encounter [sic], include the contract negotiation and signing; report to the parent company regarding development progress.

The petitioner also indicated that it employed six individuals, including the beneficiary, in the positions of president, import/export director, purchaser, secretary/bookkeeper, inventory clerk, and sales associate.

Upon review of the petition and supporting documents, the director issued a notice of intent to revoke approval of the petition. The director's reasons for the notice of intent to revoke focussed on the small size and type of the company. The director also found that the petitioner appeared to be a first-line supervisor of non-professional employees.

In rebuttal to the director's notice of intent to revoke, the petitioner submitted a letter signed by both the petitioner and the petitioner's new counsel. Counsel for the petitioner asserted that the size and nature of an organization are irrelevant in determining whether the beneficiary qualifies as an executive. Counsel also asserted that all of the beneficiary's time was devoted to setting policies and goals, supervising in-house professionals/managers and outside contractors, and meeting with the parent company. Counsel further asserted that the beneficiary was not a first-line supervisor. Counsel finally asserted that the beneficiary met all four elements of the statutory definition of "executive capacity."

The petitioner, also in the rebuttal letter, stated that the beneficiary spent 50 percent of his time devoted "to establishing

policies and goals with respect to market research, market development, sales strategy, advertising program, financial objectives, investment funding, internal organizational structure, human resources management, etc." The petitioner stated that the beneficiary spent an additional 20 percent of his time devoted "to liaisoning [sic] with stockholders, directors, senior managers and executives of the parent company." The petitioner further stated that the beneficiary spent 30 percent of his time devoted "to supervising and controlling the work of a business manager and a controller, and through them, in-house sales staff and an outside accountant, legal consultant and freight forwarder." The petitioner indicated that it employed six salaried individuals and three outside independent contractors identified as a firm of accountants, a law firm, and a freight forwarding company. The petitioner indicated that the beneficiary directly supervised a business manager who, in turn, managed the work of the sales staff, the outside freight forwarder, and the licensed attorney. The petitioner also indicated that the beneficiary directly supervised the office controller who coordinated financial management with an outside accounting firm.

The record of proceeding also contained the petitioner's California DE-6 Form, Quarterly Wage and Withholding Report for the quarter ending June 20, 2000, the quarter in which the petition was filed. The California DE-6 Form revealed four employees, including the beneficiary.

The director determined that the petitioner had not provided any evidence to support the petitioner's claim that the beneficiary's duties were managerial or executive. The director concluded that the petitioner had not submitted sufficient evidence to overcome the notice of intent to revoke.

On appeal, counsel for the petitioner submits the same letter submitted in rebuttal to the director's notice of intent to revoke. Counsel also submits the petitioner's financial statements dated December 31, 2001 and the petitioner's payroll records for the month of April 2002.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The initial description of the beneficiary's duties was so vague and general that it did not convey an understanding of the beneficiary's specific day-to-day duties. The petitioner's rebuttal to the director's notice of intent to revoke still does not provide specific information regarding the beneficiary's duties. The description remains vague. For example, the petitioner stated that the beneficiary spent 50 percent of his time establishing goals and policies relating to market research and development, sales strategy, advertising, financial operations, and human resources

management. It cannot be determined from this statement whether the beneficiary will be performing executive or managerial duties with respect to these tasks or will be actually performing the duties associated with these tasks. 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 stated that the beneficiary spent an additional 20 percent of his time devoted to meeting with stockholders, directors, senior managers, and executives of the parent company. However, the petitioner does not provide any supporting documentation of these interactions or meetings. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner also indicates that the beneficiary spends 30 percent of his time supervising and controlling others. The record is unclear regarding the beneficiary's duties as it relates to the supervision of others. It cannot be determined from the record whether the petitioner is claiming that the beneficiary spends this time on managerial duties as opposed to executive duties as defined by the Act or whether the petitioner is claiming that these "managerial" duties are also "executive" duties. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is representing the beneficiary is both an executive and a manager it must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The petitioner's information regarding the beneficiary's supervision of others also contradicts the information provided in the initial petition regarding the employees the beneficiary supervised. 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). The petitioner initially provided an organizational chart that showed the beneficiary supervising an import/export director who in turn supervised a secretary/bookkeeper, a purchaser, and an inventory clerk. The petitioner's organizational chart in rebuttal to the notice of intent to revoke depicts the beneficiary supervising a general manager. In

turn, the general manager supervises the account department who supervises the sales department and the inventory/shipping department. A third description of the petitioner's organizational structure is contained in the petitioner's rebuttal letter. The rebuttal letter claims that the beneficiary supervises a business manager and a controller and through them, in-house sales staff, outside consultants and a freight forwarder.

In addition to the contradictory information contained in the record, the petitioner has not provided independent evidence that it employed all of the above individuals or firms. The petitioner's California Form DE-6 for the period in question shows the employment of only four individuals including the beneficiary.[1] Although the beneficiary is always designated the president of the organization, it is not possible to determine the exact role the other three individuals play in the organization. The petitioner has not provided independent evidence that it uses outside contractors on a consistent and full-time basis. As noted above, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*.

Counsel's assertion that the beneficiary meets all the criteria set out in the definition of "executive capacity" is not persuasive. 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). The record does not support counsel's conclusory assertion.

Contrary to counsel's assertion the director may consider the size and nature of the petitioner. However, in doing so, the director must also take into consideration 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 Bureau 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 two-year-old trading company that employed the beneficiary as president, and three other employees, whose roles cannot be determined from the record. As noted above, the petitioner has not provided supporting evidence that independent contractors were hired on a continuous and full-time basis. Based on the petitioner's lack of consistent information regarding its number of staff and their

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[1] A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

roles in the organization, 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 managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

In sum, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director the petitioner has not established a qualifying relationship with the beneficiary's overseas employer. 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 foreign entity. The petitioner has submitted contradictory evidence regarding its qualifying relationship with the beneficiary's overseas employer. The petitioner stated in the letter in support of the petition that it was a wholly-owned subsidiary of a Hong Kong company. The petitioner provided a stock certificate issued to the Hong Kong company in support of this statement. However, the petitioner in its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 1999, at Schedule E and at Schedule K, identifies the beneficiary as its 100 percent owner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho, supra*. The petitioner has not established a qualifying relationship with the beneficiary's overseas employer.

In addition, the petitioner has not established that the beneficiary was employed for one year prior to entering the United States in a managerial or executive capacity by the overseas entity. The record lacks a comprehensive description of the beneficiary's duties for the overseas entity. The Bureau cannot determine from the limited information available that the beneficiary worked in a managerial or executive capacity for the overseas employer.

For these additional reasons the petition may not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.