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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

APR 18 2003

File: WAC 02 069 56073 Office: CALIFORNIA 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)

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 denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in April 2000. It is a diamond wholesale business. 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 determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director made mistakes in fact and law and that the petitioner had provided sufficient evidence to establish that the beneficiary's duties would be managerial and 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):
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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. 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-
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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
>
> 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 provided a Form ETA 750, Application for Alien Employment Certification that described the beneficiary's job as follows:

> Plans and develops and establishes organization policies and goals and coordinates activities of departments such as planning, sales to effect operational efficiency and economy. Reviews activities reports and financial statements to determine progress and status in attainting [sic] objectives.

The petitioner's letter in support of the petition indicated that the beneficiary "will be responsible for planning and developing the company and objectives, establishing corporate policies, reviewing the sales of the company, hiring employees, and developing marketing strategies."

The petitioner also provided its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year 2000. The IRS Form 1120 reflected gross receipts in the amount of $485,361, and that neither officers nor employees were compensated.

The director requested that the petitioner provide its organizational chart and the job titles and job descriptions of all employees under the beneficiary's supervision. The director also subsequently requested a copy of the petitioner's California Form DE-6, Employers Quarterly Wage Report for the quarter in which the petition was filed.

In response, the petitioner submitted its organizational chart depicting the beneficiary as president and describing the beneficiary's duties as follows:

- Responsible for the effective coordination of office activities in a manner which maximizes sales, earnings, customer satisfaction and development of personnel.
- Initiates and develops objectives and policies, reviews financial statements to increase profits and supervises day to day [sic] business affairs of organization.
- Authority to engage in all personnel matters, including: [sic] recruiting, terminating, and promoting of professional staff.
- Makes key decisions for marketing strategies.

The organizational chart also depicted a vice-president and a financial officer reporting directly to the beneficiary. The petitioner described the vice-president's duties as directing sales and marketing strategy, promotion, sales of accounts, and preparing activity reports for the president. The petitioner described the financial officer's duties as preparing purchase contracts and reviewing project budget expenditures for the president. The organizational chart also depicted a sales person and a secretary reporting to the vice-president. The sales person's duties involved product sales, client relations and preparing correspondence, answering phones, and sending facsimiles to clients. The secretary's duties involved answering the phone, drafting documents as directed by the president, and preparing and arranging the shipping of goods. The organizational chart also depicted a clerk reporting to the financial officer. The clerk's duties involved maintaining and organizing purchase and sales records and administering records management policies and attendance records.

The petitioner also provided its California Form DE-6 for the quarter ending March 31, 2002 showing the number of individuals employed at the time the petition was filed. The California Form DE-6 depicted four employees in the positions of vice-president, financial officer, secretary and the fourth employee's position could not be determined from the record.

The director determined that the petitioner had not established the necessity for three manager/executives in a four-person organization. The director concluded that the beneficiary would be involved in performing numerous menial tasks and other non-supervisory duties. The director determined that the petitioner also had not provided sufficient evidence to establish that the beneficiary would supervise employees holding professional positions or to show that the beneficiary was a functional manager.

On appeal, counsel for the petitioner asserts that the petitioner provided evidence that the beneficiary directs an organization of five employees. Counsel also states that a sole employee may qualify as serving in an executive or managerial capacity. Counsel cites an unpublished decision in support of this statement. Counsel notes there is no minimum size or staffing level set by statute or case law and asserts that there is no requirement that an organization must meet a minimum organizational complexity. Counsel also states that there is no requirement that a beneficiary must supervise professional or managerial employees. Counsel asserts that, in this case, the beneficiary has ultimate authority over the operation of the entire organization, and thus, he is managing an essential function of the company.

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). In the instant case, the petitioner

submits a broad position description which refers, in part, to duties such as "initiates and develops objectives and policies," and reviews financial statements," and "makes key decisions for marketing strategies." Not only does this job description paraphrase elements contained in the definition of "executive capacity," it is not possible to determine whether the beneficiary is performing managerial or executive duties with respect to these tasks or is actually performing the 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 remainder of the position description indicates that the beneficiary will be performing managerial or supervisory duties in regard to coordinating office activities, supervising day-to-day operations, and engaging in all personnel decisions. Again, the exact nature of the beneficiary's duties in regards to these activities and whether the duties comport with the definition of executive or managerial capacity cannot be discerned from the record.

The petitioner also has not submitted sufficient independent information to conclude that it employs five individuals in addition to the beneficiary. The California Form DE-6 reveals four employees but only three of these individuals can be matched with individuals identified on the petitioner's organizational chart. 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 record, as it stands, only provides independent evidence of individuals employed in the positions of vice-president, financial officer, and secretary.

Counsel correctly states that a sole employee may qualify as serving in an executive or managerial capacity and that there is no minimum size or staffing level set by statute or case law in determining the issue of managerial or executive capacity. However, the director may consider the size, nature, and staffing level of the petitioner in making his decision; although, if doing so, the director must also consider the reasonable needs of the organization. *See* section 101(a)(44)(C) of the Act. To determine the reasonable needs of a petitioner, the Bureau must have sufficient information regarding the tasks of the petitioner's employees or independent contractors, independent evidence of the individuals actually compensated by the petitioner for performing necessary tasks, consistent evidence demonstrating the roles of the employees or independent contractors, and an understanding of the nature of the petitioner's business. In the case at hand, the petitioner provided brief job descriptions for five employees but only provided evidence of the employment of three individuals in

identifable roles. The job descriptions provided for the verifiable staff on hand at the time the petition was filed are not sufficient to allow a conclusion that these individuals could fulfill the reasonable needs of the petitioner, and thus, relieve the beneficiary from performing non-qualifying tasks. The lack of information on this issue, coupled with the general job description provided for the beneficiary does not allow a contrary conclusion. 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.

Counsel is also correct in stating that there is no requirement that a beneficiary must supervise professional or managerial employees. However, if the petitioner is contending the beneficiary's role in the organization is primarily managerial, and the beneficiary is not supervising managerial, supervisory, or professional employees, the petitioner must demonstrate that the beneficiary manages an essential function of the petitioner. Moreover, the petitioner must establish that the beneficiary also fulfills the criteria of the remainder of the managerial definition. A statement that the beneficiary's ultimate authority over the operation of the organization is the equivalent of managing an essential function is not sufficient. The beneficiary's duties in relation to the essential function must be described. As noted previously, the record is deficient in providing a comprehensive description of the beneficiary's daily duties. Furthermore, the petitioner must adequately identify the essential function instead of stating generally that the essential function is the entire organization.

In sum, 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 will be primarily managerial or executive. The descriptions of the beneficiary's job duties are general and, at most, indicate that a majority of his duties relate to the supervision of lower-level employees. Further, the record does not sufficiently demonstrate that the beneficiary manages a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Bureau 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 at the time of filing the petition had been or will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not provided evidence of its ability to pay the beneficiary the proffered wage of $30,000 per year. In determining the

petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986)(citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the case at hand, the AAO has only the petitioner's year 2000 IRS Form 1120 in the record. As noted above, the IRS Form 1120 indicates that no salaries were paid and no compensation was made to officers. The net taxable income on the IRS Form 1120 is $9,976. This sum is not sufficient to pay the beneficiary's proffered wage. No other objective evidence has been submitted to demonstrate the petitioner's ability to pay the proffered wage.

Also beyond the decision of the director, the petitioner has provided a brief and general overview of the beneficiary's duties for the overseas employer. Such a description is not sufficient to establish that the beneficiary was employed in a managerial or executive position with the overseas entity. *See* section 101(a)(44)(A) and (B) of the Act.

As the petition will be dismissed for the reasons stated above, these issues are not examined further.

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.