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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: WAC 02 072 53196 Office: CALIFORNIA SERVICE CENTER Date: APR 18 2003

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.

Roger Pitman
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 California in June 2000. It is engaged in dental business services including the operation of a dental laboratory and the sale and lease of dental machines, equipment, and material. 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 would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that all of the beneficiary's duties are at a managerial and/or executive level.

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 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
>
> 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-
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> i. directs the management of the organization or a major component or function of the organization;
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> 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.

It appears from the record that the petitioner is claiming the beneficiary will be engaged in both managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section 101(a)(44)(B) of the Act. However, it must be noted that a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity and the statutory definition for managerial capacity if it is representing the beneficiary is both an executive and a manager. The petitioner may not claim a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner initially stated, through its attorney, that the beneficiary undertook numerous managerial and executive functions. The petitioner indicated that the beneficiary had been and apparently would be responsible for strategic decisions involving transactional agreements, administration, and related business activities. The petitioner also noted that the beneficiary functioned at a senior executive level and directed an essential function, exercised policy making authority for direction and coordination of strategic product planning, procurement, and sales activities. The petitioner further indicated that the beneficiary monitored the progress of operational and administrative programs, had decision-making authority in regards to budgeting, settlement affairs, cost calculation coordination, supervision of stocktaking/inventory control, fixed asset management, and review of financial statements. The petitioner stated that the beneficiary directed market research for the introduction of the petitioner's services, developed marketing plans, directed audits, record management procedures, and planned and developed public relations policies. The petitioner stated further that the beneficiary directed workers to ensure the quality of the product, and exercised authority in regard to hiring, firing, training as well as conducting performance reviews. The petitioner indicated further that the beneficiary reviewed management studies to improve workflow and reviewed staff recommendations and approved changes in management procedures. The petitioner also stated on the I-140 petition that it employed a staff of six individuals.

The director requested further evidence of the beneficiary's managerial or executive duties. The director specifically requested a more detailed description of the beneficiary's duties, a list of all employees under the beneficiary's direction, and the percentage of time the beneficiary spent on her duties. The director also requested the petitioner's

organizational chart and copies of the petitioner's California Forms DE-6, Quarterly Wage Report, for the last year.

In response, the petitioner, again through its attorney, submitted the same position description for the beneficiary. The petitioner added, however, that the beneficiary spent the majority of her time planning and developing policies, 30 percent of her time planning and supervising marketing, 20 percent of her time supervising financial matters, and time as necessary directing legal affairs.

The petitioner also provided its organizational chart depicting the beneficiary as general manager, a secretary/account executive, a laboratory manager, and six dental technicians. The petitioner's California DE-6 showed ten employees for the quarter ending December 31, 2001. One individual on the California Form DE-6 was not noted on the petitioner's organizational chart.

The director noted that the petitioner had hired a vice-president who was apparently employed by the petitioner and was currently in intracompany transferee, nonimmigrant (L-1A) status. The director observed that the petitioner had not provided information on the vice-president or another purported L-1A manager. The director noted that the petitioner would have three L-1A managers and, with the addition of the beneficiary, would have four managers in the six to ten employee firm. The director determined that the petitioner had not established a reasonable need for an additional manager. The director also determined that the petitioner had not shown a sufficient number of support staff to relieve the beneficiary from performing non-qualifying duties. The director concluded, based on the inconsistent and inadequate information in the record, that the beneficiary would not be currently employed in an executive or managerial capacity.

On appeal, counsel for the petitioner again repeats the previous position description for the beneficiary. Counsel also provides a position description for the vice-president indicating that this individual oversees the entire business operation. Counsel indicates that the vice-president was primarily responsible for developing and expanding the petitioner's business throughout the United States. Counsel also provides a job description for a second individual not previously included on the petitioner's organizational chart, namely, a technical department manager. Counsel provides no explanation for the absence of these individuals from the previous organizational chart or the absence of their position descriptions.

Counsel provides no information demonstrating that the director's decision was in error. Counsel has not explained the inconsistent information provided in the record. The petitioner initially claimed six employees, then later claimed employment of ten individuals, but only provided job descriptions for nine of the individuals. The petitioner does not reveal that it had

requested and received an approved L-1A petition for a vice-president in response to the director's request for the petitioner's organizational chart. 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). Moreover, the position description provided on appeal for the vice-president appears to overlap the description of the beneficiary's duties in part. The beneficiary's duties and the vice-president's duties are not sufficiently delineated to demonstrate that both individuals are, or would be, employed in managerial or executive capacities.

The petitioner described the beneficiary's job duties in general terms. Stating that the beneficiary will undertake numerous managerial and executive functions and will be responsible for strategic decisions involving transactional agreements, administration, and related business activities does not convey a sense of what the beneficiary will be doing on a daily basis. The petitioner's additional statements regarding the beneficiary's decision making authority in regards to budgeting, supervision of stocktaking and inventory control, and direction of market research are more indicative of an individual performing basic operational functions for the petitioner. 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's description of duties for its other employees does not indicate that any of the beneficiary's subordinates will perform these duties, thereby relieving the beneficiary from performing these basic duties.

Moreover, the petitioner has not provided documentary evidence that the beneficiary spends a majority of her time planning and developing policies, 30 percent of her time planning and supervising marketing, 20 percent of her time supervising financial matters, and time as necessary directing legal affairs. 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 is inadequate to support a conclusion that the beneficiary will be primarily performing executive or managerial tasks rather than actually performing the day-to-day operational tasks of the petitioner.

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. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description demonstrates that the beneficiary performs necessary operational tasks of the petitioner. The description of the duties to be performed by the beneficiary does not adequately 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 her 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 has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed overseas in a managerial or executive position. The description of the beneficiary's job duties for the overseas employer is more indicative of an individual in a first-line sales supervisory position. 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. *See* section 101(a)(44)(A)(iv) of the Act. The petitioner has not provided evidence that the beneficiary supervised positions that were professional positions. For this additional reason, the petition will 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.