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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. Ave., 3rd Floor
Washington, D.C. 20536

[REDACTED]

File: [REDACTED] Office: TEXAS SERVICE CENTER

Date: APR 21 2003

IN RE: Petitioner: [REDACTED]
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]

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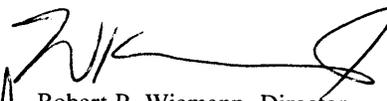
INSTRUCTIONS:

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner was incorporated in 1996 in the State of Florida and is claimed to be a subsidiary of Antares Stones, GmbH, located in Switzerland. The petitioner operates a retail jewelry store. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The director determined that the petitioner had not established that the beneficiary had been and would be employed in a managerial or executive capacity.

On appeal, counsel submits a statement disputing the director's findings. Additional evidence is submitted.

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

¹ It is noted that the petitioner filed three separate Form I-140 immigrant visa petitions for this beneficiary in 1997, 1999, and 2000, each of which was denied by the director. The three petitions include SRC 98 046 51070, which was denied due to abandonment; SRC 00 050 50309, which was denied for cause; and SRC 00 268 50449, the current petition.

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 primarily 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:

[M]anagerial responsibility for directing staff; hiring and firing personnel; managing essential functions and exercising day-to-day operations within the company, such as coordinating all financial, management analysis, business development, marketing, sales, distribution and buying activities. In the area of finance, the duties of the position more specifically include conducting statistical analysis of information affecting our investment program. This entails interpreting data concerning investments, their yield, stability, and future trends; constructing charts and graphs regarding investments; summarizing data setting forth current and long term trends in investment risks and measurable economic influences pertinent to the status of our investments; performing research and analyses relative to losses and adverse financial trends and suggesting remedial measures; preparing financial analyses of operation; participating in the establishment of economic objectives and policies; preparing reports outlining the company's financial position . . . ; participating in the preparation of budgets and financial forecasts and in the preparation of governmental reports; advising management on desirable operational adjustments due to tax and other financial reasons.

On April 10, 2001, the director instructed the petitioner to submit its organizational chart listing all of its employees by name and title and providing a brief description of each employee's job

duties. The petitioner was asked to clearly indicate which of the employees are under the direct supervision of the beneficiary.

The petitioner's response includes an organizational chart which shows that the beneficiary is at the top of the hierarchy with two retail representatives and a jeweler as the only employees of the company. The chart further indicates that all three employees are under the direct supervision of the beneficiary.

The petitioner also provided the following additional description of the beneficiary's job duties:

Her responsibilities include making all determinations regarding market penetration including establishing investment strategies and forecasts, determining where to sell the products imported by the U.S. company, fixing prices, negotiating contracts for shipping within the United States, making executive decisions regarding the targeting of products to compete within local markets [The beneficiary] has spearheaded the organization's first entry into an overseas market by developing the strategies for international business expansion into the United States. In addition, [the beneficiary] has sole authority regarding the hiring and firing of personnel and exercises unfettered discretion over the day-to-day operations of Antares Stones, Inc. She is directly responsible for establishing the goals and policies of the organization and she directs its management with wide latitude in discretionary decision-making with only limited and general input from the Swiss parent company.

The petitioner stated that the jeweler's duties include fabricating, repairing, and polishing metal and stone jewelry. The sales representatives' duties include inventory control, merchandise display and pricing, operating a cash register, and assisting customers.

The director denied the petition, concluding that the beneficiary would be primarily involved in performing the day-to-day functions of the business, and that the beneficiary was principally functioning as a staff officer.

On appeal, counsel asserts that the descriptions of the beneficiary's duties provided by the petitioner adequately establish that her job is of a managerial capacity. In support of this claim counsel cites a case previously sustained by the AAO where the petitioner was a gemstone vender. However, counsel has not established that the facts in the previously sustained case are directly parallel to those in the current petition, which involve the operation of a retail jewelry store. Furthermore, while 8 C.F.R. § 103.3(c) provides that Bureau precedent decisions are

binding on all Bureau employees in the administration of the Act, unpublished decisions, such as the one cited by counsel, are not similarly binding.

Counsel claims that the director erred in failing to consider the nature of the petitioner's business which requires the beneficiary's "personal involvement" in order to ensure the company's growth and development. However, the reasonable needs of the petitioning organization do not override the petitioner's burden of establishing that the beneficiary performs primarily managerial duties. To the contrary, if the petitioner's reasonable needs are such that the beneficiary is required to be directly involved in running its daily operations, that factor in and of itself suggests that the petitioner has no need for a primarily managerial or executive position.

In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. 8 C.F.R. § 204.5(j)(5). In the instant case, the job description indicates that the beneficiary personally conducts statistical analysis to benefit the petitioner's investment strategy, prepares reports to determine the petitioner's financial status, and prepares financial forecasts to assist in the preparation of the petitioner's budgets. While all of these tasks may be significant in furthering the petitioner's business goals, they are the tasks of a financial analyst who would be more appropriately described as a staff professional rather than a manager or executive, as determined by the director. And although the job descriptions include duties such as "establishing investment strategies and forecasts" and "participating in the establishment of economic objectives and policies," no evidence was submitted to establish these claims. Simply 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).

Finally, both the job description and the organizational chart represent the beneficiary as supervising or directing the staff of the retail store. The beneficiary's responsibilities as a first-line supervisor of a non-professional staff do not constitute managerial duties as defined by the Act. See Section 101(a)(44)(A)(iv) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iv). Based on the current record, the Bureau is unable to determine whether these supervisory duties constitute the majority of the beneficiary's duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are managerial in nature, and what proportion were actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

It is further noted that the record contains copies of purchase

orders and correspondence that has been signed or initialed by the beneficiary, thereby indicating that she is involved in the day-to-day operations of the retail store. 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). These duties are not reflected in the petitioner's description of the beneficiary's job duties and cause the Bureau to question the accuracy of the petitioner's statement. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed in a primarily managerial or executive capacity. Although counsel claims that the beneficiary directs the management of the petitioner's essential function, the petitioner has not identified the specific function that the beneficiary claims to manage, nor has the petitioner explained how the function is essential. Given the unsupported description of the beneficiary's job duties and the fact that the beneficiary has been performing the day-to-day operations of the retail store, the petitioner has not established that the beneficiary has been employed in a primarily managerial or executive position by the retail operation. Although the beneficiary's position is clearly at the top of the petitioner's hierarchy, the petitioner has failed to establish that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The record does not establish that a majority of the beneficiary's duties have been directing the management of the organization. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial 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 may not be approved.

Beyond the decision of the director, the record lacks sufficient evidence to determine that the petitioning enterprise maintains a qualifying relationship with the claimed parent company. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, *supra*; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and

authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International* at 595.

In the current petition, the Swiss business entity has not established that it is the parent company of the petitioning business. As previously pointed out by the director, the petitioner stated in its business lease that it is owned by three individuals rather than the claimed parent company. While the petitioner provided an explanation for this contradictory statement, it submitted no documentation in support thereof. 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, 591-92 (BIA 1988). As previously noted, simply 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*, *supra*. However, as this appeal will be dismissed on the grounds discussed above, the issue of a qualifying relationship need not be further addressed.

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.