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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

JUL 02 2003

File: WAC 02 067 53120 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]

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 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 states it is a corporation organized in the State of California in March 1996. It is engaged in the marketing and distribution of knit garments. 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, based on the evidence in the record, the beneficiary had not been and would not be primarily employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary's position as president of the petitioner is both an executive and a managerial position.

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 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-
>
> 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.

The most thorough description of the beneficiary's duties for the petitioner is provided in response to the director's request for a more detailed position of the beneficiary's actual daily duties. The petitioner stated that the beneficiary spent 40 percent of his time on marketing and business development functions. The petitioner further details the beneficiary's duties regarding these functions as follows:

- Directing business development and marketing functions of the company;
- Developing, installing, and maintaining marketing systems and services;
- Creating an efficient business infrastructure in the U.S.;
- Supervising maintenance of marketing systems and project activities regarding the effective use of resources;
- Directing the provision of quality customer service functions, including establishing commitments with corporate clients;
- Directing the company's advertising, public relations, networking, and personnel functions;
- Overseeing publicity and public relations planning;
- Arranging potential client meetings;
- Developing [the petitioner's] image/presence in the knit garment markets;
- Overseeing the drafting of marketing plans and contracts; and
- Overseeing market research and analysis.

The petitioner also stated that the beneficiary spent 30 percent of his time on distribution functions. The petitioner further details the beneficiary's duties regarding this function as follows:

- Directing and coordinating the company's distribution efforts;

- Determining customer requirements and resources allocation, and estimating the costs of each project;

- Developing appropriate plans necessary to ensure consistency and efficiency of customer-specific projects and ensuring such projects are executed in accordance with corporate standards;

- Monitoring the quality of products, as well as the effectiveness of the distribution of such products;

- Determining sales volume and delivery schedules;

- Training personnel in distribution and quality control processes;

- Meeting regularly with the staff to review current policies and procedures;

- Reporting progress to [the] foreign parent company; and

- Maintaining constant communication with customers and parent company.

The petitioner also provided further detail regarding the time the beneficiary spent on accounting, finance, and budgeting functions (20 percent), as well as administrative and human resources functions (10 percent).

The petitioner submitted position descriptions for the individuals holding the positions of vice-president/chief financial officer, accounting manager, sales representative, purchasing specialist, personnel/administrative specialist, and quality assurance specialist. Each description listed the individual's duties. However, the position descriptions did not include duties relating to marketing, advertising, public relations, networking, drafting contracts, coordinating distribution, and determining sales volume and delivery schedules. The petitioner indicates that the beneficiary spends 70 percent of his time on duties relating to marketing and distribution but has not demonstrated that other employees carry out the duties, thereby relieving the beneficiary from performing the non-executive, non-managerial aspects of those duties. 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 clearly shows that it employs individuals who handle the

routine accounting, financing, and budgeting functions as well as the administrative and human resource functions. However, directing, managing, or supervising the individuals performing these duties comprise only 30 percent of the beneficiary's time.

It is not clear from the director's decision whether the director considered the position descriptions provided by the petitioner or whether the director focussed primarily on the petitioner's organizational chart to conclude that the petitioner employed three "manager/executives" in an eight employee business. However, when 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 petitioner's description of the beneficiary's marketing and distribution duties is not sufficiently detailed to conclude that the beneficiary's performance of these duties is restricted to primarily executive duties. It is not possible to conclude that the beneficiary is primarily performing these duties as an executive, rather than primarily performing the routine and necessary operational acts relating to the marketing and distribution of the petitioner's products. The petitioner's description of job duties for the beneficiary and for the petitioner's other employees, when reviewed together, do not demonstrate that the beneficiary is primarily employed in an executive capacity.

In addition, the petitioner's description of job duties does not demonstrate that the beneficiary is employed primarily in a managerial position. Interpreting the position description for the chief financial officer liberally, a position subordinate to the beneficiary on the organizational chart, the position could be construed as involving supervisory duties. However, according to the petitioner, the beneficiary does not primarily spend his time supervising or managing the vice-president. Moreover, the petitioner's assertion that the position description for the accounting manager clearly encompasses managerial and/or professional capacity is not substantiated in the record. 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). For example, the petitioner has not provided any documentary evidence of reports prepared or reviewed by the accounting manager. The petitioner has not effectively described how the duties listed for this position actually comprise managerial or professional duties. The assertions of the petitioner in this regard 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 petitioner has not provided sufficient evidence demonstrating that the beneficiary primarily supervises managerial or professional employees.

Further, the petitioner's assertion that the beneficiary manages an essential function is not substantiated. As previously stated, the petitioner's description of the beneficiary's duties does not demonstrate that the beneficiary is primarily engaged in management responsibilities rather than the provision of essential operational functions for the petitioner. *See Matter of Church Scientology International, supra.*

The petitioner's citations to various unpublished decisions carry no probative value. The petitioner has not provided evidence establishing that this case is analogous to the cited unpublished decisions. Moreover, unpublished decisions are not binding on the Bureau in its administration of the Act. *See* 8 C.F.R. § 103.3(c). Further, an opinion, designated by the petitioner as an expert opinion, does not address the interpretation of "executive capacity" found in precedential case law. *See Matter of Church Scientology International, supra.*

In sum, the petitioner has not provided sufficient evidence that the beneficiary primarily utilizes other personnel to actually accomplish various fundamental tasks of operating the business. 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.

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.