

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

B4

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



JUL 02 2003

File: WAC 01 278 51061 Office: CALIFORNIA SERVICE CENTER

Date:

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:



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 November 1999. It is engaged in the import and export business. 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 had been or would be primarily employed in either a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary satisfies the executive and managerial statutory definitions.

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 petitioner initially stated that the beneficiary as general manager would direct, plan, develop, establish policies, operate, manage, and supervise the goals and objectives of the corporation. The petitioner provided an organizational chart depicting eight positions. The chart did not include names of individuals holding any of the positions.

The director requested a more detailed description of the beneficiary's duties in the United States including the percentage of time the beneficiary spent in each of his listed duties. The director also requested the petitioner's organizational chart including the names, job titles, and a brief description of all the individuals under the beneficiary's supervision. The director further requested the petitioner's California Forms DE-6, Employer's Quarterly Wage Reports.

In response, the petitioner stated that the beneficiary spent 50 percent of his time "mak[ing] good communications, fast reaction, negotiation and business relations between the parent firm and our existing & prospective buyers as business strategy in the United States." The petitioner stated that the beneficiary spent 30 percent of his time "direct[ing], control[ling] plan[ning], supervis[ing], cooperat[ing] [sic] the corporation." The petitioner stated that the beneficiary spent the remaining 20 percent of his time "mak[ing] decisions for financing, marketing, and purchasing. [sic] and execut[ing] the business contracts and manag[ing] personnel for the goals of the parent corporation."

The petitioner also provided a revised organizational chart depicting the beneficiary as president and three vacant positions subordinate to the beneficiary. The petitioner also provided an Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement issued to the beneficiary for the year 2001. The petitioner provided no evidence of other employees.

The petitioner also noted that its type of business did not involve buying and selling products, but rather, involved obtaining orders from buyers and directing exports to the buyers from the parent company.

The director determined that the petitioner did not require an executive as it was a one-employee import and export business. The director also determined that the beneficiary would necessarily be performing non-qualifying duties. The director further determined that the beneficiary did not qualify as a manager because the beneficiary was essentially a first-line supervisor over

non-professional and non-managerial employees. The director finally determined that the beneficiary was not a functional manager because the beneficiary would be performing the routine operational functions of the petitioner.

On appeal, counsel for the petitioner asserts the beneficiary qualifies as an executive and manager. Counsel asserts the beneficiary analyzes the market, establishes the goals and policies of the organization, exercises discretionary decision-making regarding design samples and design selections, and receives only general direction from the president of the parent company. Counsel also notes that, although the beneficiary currently is the petitioner's only employee, the petitioner plans to expand the organization in the future.

Counsel's assertions are not persuasive. 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 description of the beneficiary's job duties is indicative of an individual performing all the operational functions of the petitioner. The beneficiary primarily acts as an agent for the parent company in negotiating with prospective buyers and signing business contracts. 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).

Counsel's assertion that the beneficiary analyzes the market, establishes the goals and policies of the organization, exercises discretionary decision-making regarding design samples and design selections, and receives only general direction from the president of the parent company also 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). Moreover, counsel's statements only confirm that the beneficiary is primarily performing the necessary operational tasks for the petitioner. Further, counsel's statement that the petitioner plans to expand its operations in the future is not relevant to the case at hand. 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).

In sum, the petitioner has not provided evidence that the beneficiary has been or will be primarily performing executive or managerial duties for the petitioner. The record does not contain sufficient evidence to demonstrate that the beneficiary directs or manages the organization. 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 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 a qualifying relationship with the beneficiary's overseas employer. The petitioner states that the beneficiary's overseas employer owns 100 percent of its stock. However, the petitioner issued its stock certificate number one to the foreign entity but noted the beneficiary's name in parenthesis after the foreign entity's name. In addition, the petitioner's IRS Form 1120, U.S. Corporate Income Tax Return for the year 2000 indicates that the beneficiary is the 100 percent owner of the petitioner. 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 has not established a qualifying relationship with the beneficiary's overseas employer.

In addition, the petitioner has not established that it has been doing business for one year prior to the filing of the petition in August 2001 as required by 8 C.F.R. § 204.5(j)(3)(i)(D). The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

As previously stated, it appears that the beneficiary is acting as a mere agent of the overseas entity and that the petitioner is not engaged in the continuous provision of goods and/or services on its own. The record does not contain invoices for the one-year period prior to the petition being filed that demonstrates that the petitioner was engaged in business transactions.

Further, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$26,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered

wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner provided its IRS Form 1120 for the year 2000. The IRS Form 1120 indicates that the petitioner had gross receipts of \$7,937, compensated officers in the amount of \$10,500, had paid no other salaries, and had a net loss of \$10,832. The petitioner also provided an IRS Form W-2 issued to the beneficiary for the year 2001. The IRS Form W-2 indicated that the petitioner had paid the beneficiary 12,000 for the year. Neither of these documents establishes that the petitioner has the ability to pay the beneficiary the proffered wage of \$26,000 per year.

For these additional reasons 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.