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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

JUL 23 2003

File: WAC 01 289 54892 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 is a company organized in the State of California in July 1998. It is engaged in trading and selling textile goods. 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's decision is arbitrary, capricious, and an abuse of discretion.

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-
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> 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.

Counsel for the petitioner correctly notes that a beneficiary may either be classified as a manager or an executive for this visa classification. However, it must also be noted that a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner initially provided a broad position description for the beneficiary's position as president. The petitioner indicated that the beneficiary would be responsible for overseeing the operations of the company and setting and implementing goals for the company. In addition, the petitioner indicated that the beneficiary would be responsible for reviewing potential market opportunities and overseeing negotiations for large sales contracts. The petitioner concluded by indicating that the beneficiary would direct and manage the organization and exercise wide discretion in overseeing business developments in the United States.

This description of the beneficiary's duties, for the most part, paraphrased elements contained in the statutory definition of executive and managerial capacity without conveying an understanding of the beneficiary's actual daily duties. *See* section 101(a)(44)(A)(i) and (iv) and 101(a)(44)(B)(i), (ii), and (iii) of the Act. The director correctly requested a more detailed description of the beneficiary's duties including a list of all employees under the beneficiary's direction and the percentage of time the beneficiary spent in each of his listed duties. The director also requested the petitioner's California Form DE-6, Quarterly Wage and Tax Report to substantiate the petitioner's claimed employees as well as a description of job duties for each of the employees on the California Form DE-6 Report.

In response, the petitioner provided a more detailed description[1] of the beneficiary's duties as well as a list of discretionary decisions made by the beneficiary in the previous six months. The petitioner also provided its California Form DE-6 for the quarter in which the petition was filed. The California Form DE-6 for the

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[1] The director's decision and the petitioner's appeal both contain the description of the beneficiary's job duties. The position description will be repeated and used in this decision only to demonstrate particular points.

quarter ending September 30, 2001 shows the petitioner employed four individuals, the beneficiary as president, a sales manager, and two sales representatives. The petitioner's California Form DE-6 for the fourth quarter also showed that the petitioner employed four individuals but replaced an individual previously employed as a sales representative with an individual identified as the petitioner's vice-president. The AAO will review this case based on the circumstances in place at the time the petition was filed. 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). The petitioner's subsequent hiring of a vice-president is not relevant to establishing the beneficiary's eligibility for this classification at the time the petition was filed.

On appeal, petitioner's counsel claims that the director did not explain why he found the beneficiary's job description insufficient to establish a managerial or executive capacity. Counsel asserts that the description provided satisfied all the criteria found in the definition of managerial capacity and three criteria (section 101(a)(44)(B)(i), (ii), and (iii) of the Act) found in the definition of executive capacity.

The first portion of the petitioner's description indicates that the beneficiary directs the company's sales and marketing through subordinate executive and managerial personnel. This portion of the description, thus, refers the Bureau's attention to the petitioner's staffing, namely other executives and managers. As noted above, the position of vice-president had not been created or filled at the time the petition was filed. The petitioner, at the time the petition was filed, employed a "sales manager" and two sales representatives, in addition to the beneficiary.

When determining the nature of the "sales manager" position, and whether the position is a managerial position, the Bureau must look to the petitioner's description of the "sales manager's" job duties. The duties of the "sales manager" included responsibility for managing all sales and marketing, meeting with customers, brokers and local suppliers, negotiating contracts, and monitoring garment and textiles industry trade information. This description reflects an individual primarily involved in the sale of the petitioner's product. The petitioner does not provide evidence that the "sales manager's" duties comprise managing other staff or an essential function. Going a step further in determining whether the "sales manager" manages other staff, the Bureau reviews other information in the record. The description of the sales representatives' duties indicates that these individuals accept direction from the "sales manager." However, it does not appear from the record that the "sales manager" primarily provides direction to these two staff members other than as the senior or more experienced sales representative on the sales team. It is important to note that the salaries of the "sales manager" and the

two sales representatives are comparable, thus supporting a conclusion that the "sales manager" is a "manager" in title only.

Contrary to counsel's assertion that the first portion of the description of the beneficiary's duties satisfies portions of the definitions of executive and managerial capacity, this description demonstrates only that the beneficiary directly supervises the petitioner's non-managerial sales team.

The second portion of the beneficiary's job description indicates that the beneficiary is responsible for ensuring the success of the company. This description is vague and does not convey an understanding of the beneficiary's job duties. An individual who is responsible for the success of a company may or may not have job duties that encompass the criteria of an executive. The Bureau cannot discern from this brief and conclusory statement that the beneficiary is engaged in primarily executive duties.

The third portion of the beneficiary's job description indicates that the beneficiary directs the purchase of raw materials for the overseas company's manufacturing of textiles. The petitioner indicates that the beneficiary does this by utilizing his contacts with outside vendors. However, the petitioner does not provide documentary evidence of the beneficiary's contact with outside vendors, does not provide evidence of contracts with outside vendors, and does not indicate how much time the beneficiary spends purchasing the raw materials. 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). Without more information regarding the beneficiary's involvement in this function, the Bureau cannot determine that his involvement is in an executive or managerial capacity. 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 fourth portion of the beneficiary's job description indicates that the beneficiary oversees the distribution of the company's products to customers. Upon review of the sales representatives' duties, it appears that these two individuals may be engaged to some degree in moving the inventory to customers and ensuring proper delivery. Interpreting the job descriptions provided liberally, the beneficiary directly supervises the distribution of the company's products.

The fifth portion of the beneficiary's job description indicates that the beneficiary establishes policies for the efficient sales

of products. The petitioner has not provided any documentary evidence of the beneficiary's policy making for this function. It is noted that the petitioner does indicate that the beneficiary made decisions to restrict the sales representative's costs and also revised sales goals. However, the petitioner has not documented these decisions. As stated previously, going on record without documentary evidence is not sufficient for the purpose of this immigrant classification. *See Ikea US, Inc. v. INS, supra; Republic of Transkei v. INS, supra; Matter of Treasure Craft of California, supra.*

The sixth portion of the beneficiary's job description indicates that the beneficiary implements the policies and goals through managers and subordinate personnel. As determined previously, the petitioner has not established its use of managers. The beneficiary as the supervisor of the three subordinate sales employees would, of course, instruct the supervised employees on the goals and policies of the company. Instructing subordinates is not sufficient to classify the beneficiary as a manager or an executive for immigration purposes.

The seventh portion of the beneficiary's job description indicates that the beneficiary determines fiscal priorities, authorizes corporate spending and project management, including budgeting, time constraints, and all matters related to the hiring, firing and promotion of personnel. It is noted that the vice-president, upon his employment with the petitioner, takes over some of the duties listed in this portion of the petitioner's description. Although it is not clear from the record, it appears that prior to the vice-president's employment, the beneficiary would have been responsible for providing these services to the petitioner. The record is insufficient in establishing who performs the duties, other than the beneficiary, prior to the vice-president's employment. *See Matter of Church Scientology International, supra.*

The petitioner concludes the position description by stating that the beneficiary will spend 100 percent of his time establishing and implementing company policies and goals consistent with the company's long term goals and the above stated duties. Again, this broad statement paraphrases the second element of the executive capacity definition without conveying an understanding of the beneficiary's actual tasks. *See* section 101(a)(44)(B)(ii) of the Act.

The petitioner's description of the beneficiary's duties does not provide a sufficiently comprehensive description to conclude that the beneficiary will be performing managerial or executive duties for the petitioner.

Counsel for the petitioner notes that the director did not address the petitioner's examples of the beneficiary's decision making for the previous six months. The petitioner noted that the beneficiary's decisions/duties included meeting with the

vice-president and making several requests of the vice-president and an accountant. The requests appear to be, in part, a delegation of duties. However, as previously stated, the petitioner did not employ the vice-president until some time after the petition was filed, and thus, these decisions are not relevant to the proceeding at hand. The petitioner also stated that the beneficiary communicated on two issues with the overseas parent company. Such communications, even if documented in the record, do not necessarily denote executive or managerial capacity. The petitioner also indicated that the beneficiary made several decisions regarding the sales staff mostly regarding cutting costs and sales goals. These decisions are part of a supervisor's regular duties. Without a more thorough understanding of the petitioner's overall organizational complexity, the AAO declines to speculate that supervising a sales staff of three individuals includes executive or managerial capacity.

Counsel asserts that the beneficiary is not a first-line supervisor and cites a district court case in support of this assertion. However, the issues in the district court case (proper interpretation of the 1983 immigration regulations versus 1987 immigration regulations) are not on point. Moreover, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

On appeal, counsel concludes that the beneficiary only partially fulfills the criteria of an executive; thus, counsel apparently acknowledges that the beneficiary is not primarily an executive. Counsel, nevertheless, asserts that the beneficiary fulfills all the criteria of a manager and asserts that the beneficiary is managing the company through other managers and subordinates. As previously stated, the petitioner has not provided sufficient evidence to establish that beneficiary's subordinate employees are managers or supervisors. The "sales manager" position is a managerial position in title only. Moreover, the description of the "sales manager's" duties is not sufficient to establish this position is a supervisory position over lower level employees. Based on the job descriptions and the salaries of the employees, the organizational structure at the time the petition was filed is a two-tier structure with the beneficiary as the only upper-tier employee. The record contains sufficient information to establish that the beneficiary is supervising the lower level employees; therefore, the record demonstrates the beneficiary holds nothing more than a first-line supervisory position. As the director notes, the petitioner has not established that the sales positions subordinate to the beneficiary's position are professional positions. The record does not sufficiently demonstrate that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) and 101(a)(44)(C) of the Act.

Counsel correctly notes that the director based his decision in part on an improper standard. In his decision, the director appears to hold the petitioner to his undefined and unsupported view of "common business practice" and "standard business logic." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act. The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act.

At the time of filing, the petitioner was a three-year-old wholesale and distribution company that claimed to have a gross annual income of $364,290. The firm employed the beneficiary as president and three sales employees. The petitioner indicated that the sales personnel performed the necessary sales work. The petitioner did not substantiate who, other than the beneficiary, performed the necessary day-to-day administrative and operational functions of the company. The reasonable needs of even a small company require day-to-day budgeting, banking, scheduling duties, distributing salaries, among other mundane operational duties. The staff on hand at the time the petition was filed could not reasonably meet the needs of the company without the beneficiary contributing to the basic operations of the petitioner. Although counsel may assert that this is a conclusory statement, the petitioner has not provided sufficient evidence to allow an alternate conclusion. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

In sum, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive duties.

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.