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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

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

[redacted]

File: WAC 02 025 55371 Office: CALIFORNIA SERVICE CENTER Date: MAY 07 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)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 Director of the California Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president/chief executive officer (CEO). The petitioner, therefore, 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 denied the petition on the ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief and copies of documents already included in the record. Counsel states, in part, that, because the beneficiary will operate at a senior level within the company and have complete discretion over funds and contracts, the beneficiary merits classification as a multinational executive or manager.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a

statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of [redacted] of Greece; (2) imports and exports agricultural products; and (3) employs three persons, including the beneficiary, who is currently occupying the proffered position as an E-1 nonimmigrant treaty trader. The petitioner is offering to employ the beneficiary on a permanent basis at a salary of $1,635 per week.

The issue to be discussed is whether the proffered position of president/CEO is in an executive or managerial capacity.

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.

At the time of filing the petition with the California Service Center on October 9, 2001, the petitioner did not describe the proffered position in any detail. The petitioner stated only that the beneficiary would oversee its day-to-day operations. Therefore, on February 2, 2002, the director requested additional evidence from the petitioner, to include:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission. (Emphasis in original.)

- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific. Also, indicate [the] percentage of time spent in each of the listed duties.

- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees at the beneficiary's work site for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees.

The petitioner declined to submit the requested organizational chart, as well as copies of the DE-6 forms and job descriptions for the employees whom the beneficiary would supervise. Counsel stated that the petitioner employed a president, a vice president and a secretary, and that there were "no other staffing levels because the organization's business is of such a nature that it requires contracts with outside agricultural and agronomy firms to hire outside contractors. . . ." Regarding the beneficiary's duties in the United States, the beneficiary, acting as the petitioner's representative, submitted a letter describing his position, in part, as:

> It is my responsibility to seek new seed production and breeding firms and evaluate their products for potential sales overseas. I am able to do so by visiting numerous trial stations of differing companies, throughout the United States. . . . Another responsibility that I have is to personally supervise and maintain the already established agreements [the parent company] has in the USA. . . . I do so by periodically visiting and having meetings with their representatives in order to assess the existing terms and general status of our agreements and negotiate future modifications to our advantage. Finally, one of the most important responsibilities that I have is to oversee the exclusive sponsored research agreements that we have with Texas A&M at Kingsville. . . . I have to visit their research facilities at least four times a year and maintain almost daily phone contact with the research staff. . . . Besides the research done in their own facilities, we maintain a greenhouse that we donated to Texas A&M that houses our own exclusive research. . . . [W]e maintain a staff of a full professor and several undergraduate and graduate students. . . .

The director denied the petition on the basis that the proffered position was not in an executive or managerial capacity. The director noted that the petitioner had failed to submit the requested organizational chart, DE-6 forms, and job descriptions of the employees who would be supervised by the beneficiary. The director concluded that the petitioner did not have the organizational complexity to support a primarily executive or managerial position.

On appeal, counsel states that the beneficiary will exercise discretion over the petitioner's daily operations and that he will manage a subordinate staff of supervisory and managerial personnel. According to counsel, the beneficiary will supervise a permanent staff of two individuals and several researchers at Texas A&M university, maintain sole responsibility for overseeing the petitioner's daily operations, and manage and direct the development of international trade. Counsel contends that these

responsibilities fall under the definition of managerial capacity, and that they comprise the petitioner's major functions. Counsel cites several unpublished decisions from the Administrative Appeals Office to support his assertion that, as long as the beneficiary will function at a senior level and control major funds and contracts, he will be employed in an executive or managerial capacity. Counsel also states that the size of the petitioner's operations should not determine the nature of the beneficiary's duties.

Counsel correctly asserts on appeal that the size of the petitioner alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, the duties of the proffered position must be the critical factor. *See* Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The evidence presently in the record fails to establish that the beneficiary would perform the high level responsibilities that are specified in the definition of executive or managerial capacity. The beneficiary's job description indicates that his role with the U.S. company would involve seeking new products for export and visiting with business partners to ensure that the terms of contracts/agreements are met. Nothing in the beneficiary's job description establishes that he would primarily either direct the management of the petitioner's operations or a department or subdivision therein, or that he would manage a department or function. The beneficiary would perform tasks necessary for the petitioner to import and export agricultural products. As such, the proffered position is not in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988).

Additionally, the petitioner's failure to submit documentary evidence of its staffing levels along with information in the petitioner's 2001 corporate income tax return (Form 1120), calls into question the petitioner's claim that it employs three persons, including the beneficiary.

In her request for evidence (RFE), the director asked the petitioner to submit an organizational chart that listed the names, titles, and job responsibilities of the individuals whom the beneficiary would supervise, as well as DE-6 forms for the last four quarters. The petitioner declined to submit the requested organizational chart and DE-6 forms. The only evidence of the petitioner's staffing levels was an assertion by counsel that the petitioner employed three individuals in the positions of president, vice president, and secretary. A review of the petitioner's 2001 corporate income tax return (Form 1120), however, reveals that the petitioner did not pay any wages or salaries in

the 2001 calendar year. The petitioner's failure to support the claim that it employs a staff of permanent employees raises questions about the reliability and sufficiency of the evidence in the record, including whether the beneficiary's job description realistically depicts his proposed job responsibilities. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Absent a listing of the specific duties of persons supervised by the beneficiary and evidence that the petitioner employs these individuals either on a permanent or contractual basis, the petitioner has failed to establish that its claimed organizational structure exists. 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). Accordingly, as the petitioner cannot establish that it employs the individuals it claims, it, therefore, cannot show that the beneficiary would, as counsel states, direct and control supervisory and managerial employees.

Counsel refers to several unpublished decisions of the Administrative Appeals Office to support his claim that the beneficiary would be employed in an executive or managerial capacity. Although 8 C.F.R. § 103.3(c) provides that precedent decisions of the Immigration and Naturalization Service, now the Bureau, are binding on all Bureau employees in the administration of the Act, unpublished decisions are not similarly binding. Based upon evidence in the record at the present time, there is no basis to find that the beneficiary would primarily perform the responsibilities outlined in the definition of managerial or executive capacity. Therefore, the director's decision shall not be disturbed.

Beyond the decision of the director, the petitioner has not established: (1) that the beneficiary was employed in an executive or managerial capacity for at least one year in the three years immediately preceding his entry into the United States as a nonimmigrant; or (2) that it had been doing business for at least one year at the time the petition was filed.

To establish eligibility for this immigrant visa classification, a petitioner must demonstrate that the beneficiary had been employed in an executive or managerial capacity for the overseas entity for at least one year in the three years immediately preceding the beneficiary's entry into the United States as a nonimmigrant. 8 C.F.R. § 204.5(j)(3)(i)(B). To evidence the beneficiary's overseas employment, the petitioner submitted only an April 12, 2002 letter from the overseas entity, which stated that the beneficiary began his employment with the company in December of 1997 as an international sales manager. The petitioner did not submit a job description for the beneficiary's overseas position. Therefore, there is no evidence that the beneficiary was employed

overseas in an executive or managerial capacity for the requisite period of time.

A petitioner must also demonstrate that it had been doing business for at least one year at the time it filed the petition. 8 C.F.R. § 204.5(j)(3)(i)(D). The term *doing business* is defined as "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." 8 C.F.R. § 204.5(j)(2). Although the petitioner's 2001 income tax returns show that it had gross receipts/sales of $490,161, the petitioner did not show from where this income was derived. The petitioner did not submit copies of invoices or any other documentary evidence to show that this income was derived from regularly, systematically and continuously providing goods and/or services; this income could have derived from making just one or two sales during the year. Accordingly, the petitioner has not met its burden of proving that it has been doing business, as that term is defined in the regulations. However, as the appeal is being dismissed on another ground, these issues will not be examined further.

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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.