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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: WAC 01 084 52031 Office: CALIFORNIA SERVICE CENTER Date: MAY 28 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)

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 corporation organized in the State of California in December 1998. It is engaged in the import and sale of textile products. 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 erroneous.

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 the beneficiary would be responsible for overseeing all business operations, establishing the company's overall financial goals and policies, and overseeing the operation of the sales and marketing division, the accounting and finance division and the international trade division. The petitioner stated, in addition, the beneficiary would exercise wide discretion to make decisions in the maintenance of the petitioner's daily business, negotiate contracts, and hire and fire personnel.

The director requested a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary spent on each of the duties. The director also requested the petitioner's organizational chart and the job titles and job descriptions of all employees under the beneficiary's supervision. The director also requested copies of the petitioner's Internal Revenue Service (IRS) Forms 941, Quarterly Wage Report.

In response, the petitioner stated that the beneficiary supervised four employees including a sales manager, an administrative manager, an office assistant, and sales personnel. The petitioner also stated that the beneficiary "oversees the major function of the company's sales activities in the U.S." The petitioner indicated that these duties included the finalization in the negotiation of sales contracts, and authorizing and signing purchase invoices for shipment. The petitioner further states that the beneficiary exercised sole discretion in the development of pricing and marketing strategies and had ultimate authority to hire and fire personnel. The petitioner concluded by stating that the beneficiary spent a minimum of 80 percent of his time in his supervisory capacity, overseeing his employees' work such as going over purchase contract proposals and authorizing finalization of sales. The petitioner indicated that the remaining 20 percent of the beneficiary's time was spent establishing sales and marketing strategies for the expansion of the company's business.

The petitioner also indicated that the sales manager was responsible for coordination of sales distribution of products by establishing sales territories, quotas, and goals, and also, entered in to negotiations under the direction of the beneficiary. The sales personnel position's duties included communicating with prospective buyers to receive orders and to list prices for products requested. The petitioner indicated that the administrative manager was responsible for overseeing the record-keeping system and maintaining financial and corporate

documents. The petitioner indicated the office assistant aided the administrative manager.

The petitioner also submitted its IRS Form 941, for the quarter ending March 31, 2001, the quarter in which the petition was filed. The IRS Form 941 indicated the petitioner employed four individuals. The petitioner's organizational chart depicted the beneficiary as president and the four positions of sales manager, administrative manager, office assistant, and one individual as "sales personnel."

The director determined that the petitioner had not established a reasonable need for an executive because it was merely a five-employee import/export business and did not need an executive because all they did was buy and sell products. The director also determined that because the company only had five employees the beneficiary would necessarily be performing numerous menial tasks. The director further determined that the beneficiary was a first-line supervisor over non-managerial and non-professional employees. The director finally determined that the petitioner had not established that the beneficiary was a functional manager, rather than, an individual involved in the performance of routine operational activities for the petitioner.

On appeal, counsel for the petitioner asserts that the director should not determine whether the beneficiary would be acting in a managerial or executive capacity based on the petitioner's number of employees. Counsel also cites two unpublished cases for the proposition that a person who has senior level responsibility for the direction and coordination of activities and operations regarding funds manages a function. Counsel also asserts that the petitioner has a reasonable need for an executive and concludes that the beneficiary meets all the criteria set out in the definition of "executive capacity." Counsel contends that the majority of the beneficiary's time is devoted to executive duties. Counsel also submits a revised list of the beneficiary's duties and a percentage of time allocated to each of the beneficiary's duties.

The petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. The descriptions provided and the references throughout the record seem to indicate that the petitioner is claiming that the beneficiary qualifies as both a manager and an executive. However, a petitioner may not claim the beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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.

Counsel's assertions are not persuasive. It is important to note that the petitioner must establish eligibility at the time of filing the petition; 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). At the time of filing the petition, the record shows that the petitioner employed a total of four employees. It is not clear from the IRS Form 941, which four of the five employees designated on the organizational chart, were employed at the time of filing the petition.

In 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 initially provided a broad description indicating that the beneficiary would oversee operations and departments, maintain the daily business, negotiate contracts, and hire and fire personnel. Such a general description does not convey an understanding of the beneficiary's duties on a daily basis.

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner indicated that the beneficiary spent 80 percent of his time in a supervisory capacity. It is not clear from the petitioner's description of the beneficiary's duties in this capacity exactly what constituted the beneficiary's supervisory duties. It appears that the beneficiary finalized negotiation of contracts and signed purchase invoices for shipment as part of his supervisory capacity. It also appears that the beneficiary's authority to hire and fire personnel were part of the supervisory capacity. It is not possible to determine from the record whether the beneficiary is acting primarily as a first-line supervisor or whether the petitioner is claiming that the beneficiary's supervisory duties are related to the beneficiary's purported executive duties. The petitioner indicated that the beneficiary spent the remaining 20 percent of his time establishing sales and marketing strategies for the expansion of the company's business. It is not possible to determine from the vague and general descriptions provided whether the beneficiary would be performing managerial or executive duties with respect to these various tasks or would be actually performing the tasks. 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).

In addition, portions of the beneficiary's job description and the petitioner's invoices of record indicate that the beneficiary performs the petitioner's sales function. By signing the invoices, the beneficiary demonstrates discretion; however, the signed invoices also establish that the beneficiary performs the sales function. Moreover, even though the petitioner describes the positions subordinate to the beneficiary, and two of the positions

includes sales duties, this information does not clarify each employee's role in the organization.

Counsel's assertion that the majority of the beneficiary's duties are executive duties 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). 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 record does not contain a comprehensive description of the beneficiary's duties and does not provide a clear understanding of the role of each of the beneficiary's subordinate employees.

Further, counsel's submission of a description of the beneficiary's duties and revised percentages of time allocated to each of those duties will not be considered on appeal. Where the petitioner was put on notice of the required evidence, and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Moreover, even if the information were considered, it fails to clarify the beneficiary's actual role in the organization. Instead it simply presents a different version, without explanation, of the beneficiary's duties than initially submitted. 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). Further, the description is even more indicative of an individual primarily involved in performing operational tasks for the petitioner. *See Matter of Church Scientology International, supra.*

Counsel's citation to two unpublished cases in support of a claim that a person that has responsibility for the direction and coordination of activities and operations in regards to funds and operates at a senior level within the organization is managing a function, is also not persuasive. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the cases cited. Moreover, unpublished decisions are not binding on the Bureau in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Given these citations, counsel may be asserting that the beneficiary manages an essential function of the organization. However, the only reference in the description of the beneficiary's duties to the "management of a function" occurs in relation to the beneficiary's purported

oversight of the company's sales activities. As noted previously, it appears from documents submitted that the beneficiary is actually performing essential tasks in regard to the company's sales activities.

Counsel's assertion that the director should not base her decision of whether the beneficiary would be acting in a managerial or executive capacity on the petitioner's number of employees is correct. The director's statement that the petitioner does not need an executive because it is merely a five-employee import/export business and did not need an executive because all they did was buy and sell products is subjective. The director should not hold a petitioner to her undefined and unsupported view of "common business practice" or "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, 8 U.S.C. § 1101(a)(44)(C). 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 one-year-old importing company. The firm employed the beneficiary as its president. The petitioner employed three to four other employees, in the positions of administrative manager, office assistant, sales manager, and a sales person. As explained above, the petitioner's complete staffing picture at the time the petition was filed and the beneficiary's actual duties for the organization are unclear and not supported by adequate objective evidence. *See Ikea US, Inc. v. INS, supra.* To determine the reasonable needs of a petitioner, the Bureau must have sufficient information regarding the tasks of the petitioner's employees, independent evidence of the individuals actually compensated by the petitioner for performing necessary tasks, consistent evidence demonstrating the roles of the employees, and an understanding of the nature of the petitioner's business. In the case at hand, the information provided for the verifiable staff on hand at the time the petition was filed is not sufficient to allow a conclusion that these individuals could fulfill the reasonable needs of the petitioner, and thus, relieve the beneficiary from performing non-qualifying tasks. The lack of information on this issue, coupled with the general job description provided for the beneficiary does not allow a contrary conclusion. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

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.