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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: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 20 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a limited liability company established in the State of Texas in July 2000. It is engaged in the health and nutrition consulting business and the operation of a retail establishment. It seeks to employ the beneficiary as the general manager of its retail operation. 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 a qualifying relationship with the beneficiary's overseas employer. The director also determined that the petitioner had not established that it had been doing business for one-year prior to filing the petition. The director further determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director misunderstood the effect of the petitioner's purchase of a franchise business on the qualifying relationship between the petitioner and the beneficiary's overseas employer. Counsel also asserts that the petitioner commenced business operations in March 2000 more than a year prior to filing the petition. Counsel further asserts that the petitioner employs individuals in both qualifying and non-qualifying capacities.

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 first issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

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

> *Affiliate* means:
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> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner is a limited liability company. Its sole member appears to be the beneficiary. The petitioner has submitted documents relating to the overseas entity. Some, but not all, of

the documents are translated into English.[1] It appears from the translated documents that the beneficiary is officially registered as the general manager of the foreign entity. The record does not contain translated material that explains or otherwise documents the overseas entity's legal status. It is not clear from the record that the beneficiary is the sole owner of the overseas entity. 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 establish that both the petitioner and the foreign entity are owned and controlled by the beneficiary. The Bureau cannot determine from the record whether the petitioner is an "affiliate" of the foreign entity as defined by the above regulation.

Although the petitioner refers to itself as a subsidiary of the foreign entity, it is not apparent from the record that the overseas entity is a member of the petitioner, thus owning a percentage of the petitioner. Therefore, the record does not establish that the petitioner is a subsidiary of the overseas entity as defined by the above regulation.

In sum, the record is deficient in establishing a qualifying relationship between the petitioner and the beneficiary's overseas employer.

The second issue in this proceeding is whether the petitioner has established that it was doing business for one year prior to the filing of the petition 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.

The director determined that the petitioner was established in July 2000, not quite one year prior to filing the petition on June 25, 2001. Counsel acknowledges that the petitioner was established in July 2000, but asserts that the petitioner had created a business plan on June 1, 2000 and had incurred expenses

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[1] The regulation at 8 C.F.R. § 103.2(b)(3) requires any document containing foreign language to be accompanied by a full English translation that has been certified by a competent translator.

while establishing the petitioner. Counsel asserts that the activity involved in setting up the petitioner began as early as March 2000, more than one year prior to filing the petition.

Counsel's assertions are not persuasive. Although, the beneficiary was incurring expenses prior to July 2000, the petitioner was not engaged in the regular, systematic, and continuous provision of goods and/or services. The beneficiary was, perhaps, an agent of the overseas entity investigating the possibility of establishing a related company, but exploring and setting up an organization are not sufficient to establish that the petitioner is providing goods and services. The AAO notes that, in addition, the petitioner did not began to operate its acquired retail store until April 2001. Only at that time does it appear that the petitioner would have begun doing business in a regular, systematic, and continuous fashion.

The third 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;
>
> 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-
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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.

The petitioner provides only a general description of the beneficiary's job duties. The petitioner's business plan indicates that the beneficiary will be responsible for:

> Overall direction of the company, hiring and firing of personnel, and deciding the direction of the company for marketing and distribution efforts. Will approve all major contracts for the company, make all major financial decisions for the company, negotiate all legal matters for the company, establish long- and short-term goals for the corporation, establish policy for the company, and set standards of quality control.

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner also noted that the beneficiary would be introducing new methods of merchandizing, staying in contact with local business in order to acquire other businesses, controlling all tasks of the employees, controlling all reorders, and introducing new products. The petitioner also provided its Texas Workforce Commission Employer's Quarterly Report for the quarter in which the petition was filed. Based on the remuneration of the three employees described in the report, the petitioner employed two part-time workers and one full-time worker.

The director simply stated that the petitioner had not demonstrated that the beneficiary would be serving in an executive or managerial capacity due to a lack of evidence of employees.

On appeal, counsel for the petitioner asserts that the petitioner does employ three individuals and that the record reflects that the petitioner employed three individuals. 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). In this regard, the initial description of the beneficiary's duties primarily paraphrased elements contained in the statutory definition of managerial and executive capacity, rather than conveyed an understanding of the beneficiary's daily tasks. The response to the director's request for evidence, although providing more information regarding the beneficiary's daily duties, indicated that the beneficiary would be primarily involved in performing operational tasks for the petitioner rather than managing or directing the operational tasks through the work of others. 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 record supports this conclusion as the record shows that, at the time of filing the petition,[2] the petitioner employed only one full-time worker to assist the beneficiary in the operation of the retail store.

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.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of $50,000 per year. *See* 8 C.F.R. § 204.5(g)(2). The record does not contain the petitioner's Internal Revenue Service tax returns or the beneficiary's individual tax return as a member of a limited liability company. The record contains no independent evidence to allow the Bureau to evaluate the petitioner's ability to pay the beneficiary the proffered wage. For this additional reason, 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.

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[2] 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).