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U.S. Citizenship and Immigration Services

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[redacted]

MAR 0 2 2004

FILE: WAC 02 255 51288 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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 of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the employment-based visa petition. 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 March 2001. It is engaged in importing and exporting. 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 would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the beneficiary's job duties and the development of the business establish that the beneficiary is functioning in an executive capacity.

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. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive 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.

The petitioner stated on the Form I-140, Immigrant Petition for Alien Worker, that the beneficiary would perform executive duties. The petitioner submitted its California Form DE-6, Employer's Quarterly Wage and Withholding Report for the quarter ending previous to the date the petition was filed. The California Form DE-6 confirmed the beneficiary's employment and the employment of five other individuals. The petitioner also provided its 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax

Return. The 2001 IRS Form 1120 shows $917,669 in gross receipts, $15,000 in compensation to the beneficiary as an officer, and $31,200 paid in salaries.

The director requested a more detailed description of the beneficiary's duties 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 duties and titles, educational levels, dates of employment and annual salaries of each employee under the beneficiary's supervision. The director further requested a copy of the petitioner's California Form DE-6 for the third quarter of 2002, the quarter in which the petition was filed.

The petitioner provided an "assignment letter" listing the beneficiary's job duties. Counsel for the petitioner provided the same description of the beneficiary's job duties and listed percentages of time spent on each of the duties as:

> In charge of the overall management of the company (20 percent).
>
> Has authority to exercise wide latitude in discretionary decision making, to plan, develop and establish policies and objectives of the company in accordance with the Board directives (5 percent).
>
> Direct the implementation of the subsidiary's business expansion plan and operation policies (5 percent).
>
> Identifies employees' responsibilities and operating procedures for attaining business objectives (10 percent).
>
> Review activity reports and financial statements (5 percent).
>
> Direct the fully [sic] research of the investment environment of the U.S. market so as to formulate marketing strategies for the subsidiary (15 percent).
>
> Establish and revise operating procedure[s] for attaining business objectives (10 percent).
>
> Supervise, direct, coordinate and evaluate the working performances of the subsidiary personnel (10 percent).
>
> Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize company's returns on business deals, and to increase employees' performance and efficiency (10 percent).
>
> Evaluates performance of executives for compliance with established policies and objectives of firm and contributions in attaining objectives (5 percent).
>
> Has the authority to recruit, terminate, train and promote the managerial personnel based on their job performance, qualification[s] and contributions (5 percent).

The petitioner also provided its organizational chart showing the beneficiary as president and three subordinate employees reporting directly to him. The employees reporting to the beneficiary held the positions of sales assistant, purchasing assistant, and accountant. The chart indicates that the beneficiary, the sales assistant, and the purchasing assistant started working for the petitioner in January 2002. The chart showed that the accountant began working for the petitioner in April 2002.

The petitioner also submitted its California Form DE-6 for the quarter in which the petition was filed. The California Form DE-6 confirmed the full-time employment of the beneficiary and the part-time employment of the sales assistant, the purchasing assistant, and the accountant. The California Form DE-6 also included one individual employed in a part-time capacity who was not listed on the organizational chart.

The director determined that the petitioner's job description of the beneficiary's duties did not establish that the beneficiary had been or would be employed in a managerial or executive capacity. The director observed that the beneficiary appeared to be the only full-time employee and reasoned that the beneficiary would be assisting with the petitioner's day-to-day non-supervisory tasks. The director also concluded that the beneficiary would be, at most, a first-line supervisor of non-managerial and non-professional employees.

On appeal, counsel for the petitioner alleges that the director's decision was based, in part, on the conclusion that the petitioner was a small company with insufficient organizational complexity to warrant an executive. Counsel cites several unpublished decisions and asserts that small staff size does not justify a denial where the beneficiary is to be the top manager. Counsel claims that the petitioner is not a small company but rather a start-up company that would expand under the beneficiary's direction. Counsel contends that since the petitioner began business in January 2002 and the beneficiary and other employees started working in January 2002, the petitioner should be treated, by analogy, as a "new office" as defined by the regulations for nonimmigrant intracompany transferees.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original).

The petitioner provides a general description of the beneficiary's job duties. The description indicates that the beneficiary spends 25 percent of his time in charge of the management of the company and exercising wide latitude in discretionary decision-making. This description paraphrases portions of the definition of executive capacity without providing an understanding of the beneficiary's daily duties. *See* section 101(a)(44)(B)(i) and (iii) of the Act. In addition, the beneficiary spends another 25 percent of his time establishing, revising, identifying, and evaluating operating procedures. Again, the petitioner's phrases use the words found in section 101(a)(44)(B)(ii) of the Act, without conveying a sense of the beneficiary's actual duties. Repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The remainder of the petitioner's description shows that the beneficiary is formulating marketing strategies, implementing the petitioner's expansion plan, reviewing activity reports and financial statements, formulating financial programs, and recruiting and supervising personnel. The petitioner's statements do not provide sufficient information regarding the beneficiary's duties for the AAO to conclude that the beneficiary is performing executive or managerial tasks for the petitioner, rather than providing the petitioner's actual operational services. 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, on appeal, asserts that small staff size does not justify a denial if the beneficiary is the organization's top manager and cites unpublished decisions to support this claim. First, citations to unpublished cases carry little probative value. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c). Furthermore, a review of the petitioner's organizational structure and the beneficiary's subordinate staff confirm that, the beneficiary is performing the majority of the petitioner's operational and administrative tasks as the petitioner's only full-time employee. The petitioner does not provide evidence that the assistant salesperson, assistant purchaser, or the accountant relieve the beneficiary from performing primarily non-qualifying duties. The record does not contain evidence of the use of subcontractors who would relieve the beneficiary from performing basic operational duties.

Counsel's contention that CIS should treat the petitioner as a "new office" would negate the regulatory requirement for intracompany immigrant petitions found at 8 C.F.R. § 204.5(j)(3)(i)(D). Section 204.5(j)(3)(i)(D) requires evidence that "[t]he prospective United States employer has been doing business for at least one year" prior to filing the petition. If the petitioner has only been in business since January 2002, the petitioner would not have been doing business a year prior to filing the petition in August 2002. Thus, counsel's contention is without merit, except to raise concerns that the petitioner has failed to establish eligibility for this classification on another ground.

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary directs the management of the organization rather than performs the essential operational and administrative tasks. The petitioner has not provided evidence that the beneficiary supervises and controls other supervisory, professional, or managerial employees. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive.

Beyond the decision of the director, the petitioner has not adequately documented the qualifying relationship between itself and the beneficiary's foreign employer. The petitioner claims that it is a wholly owned subsidiary of the beneficiary's foreign employer. The petitioner provided a stock certificate, stock ledger, and minutes of an organizational meeting indicating that 10,000 shares would be issued to the beneficiary's foreign employer for the consideration of $100,000. The petitioner provided two wire transfers: (1) a wire transfer from the beneficiary's foreign employer in the amount of $100,000 and, (2) a wire transfer from a third party in the amount of $49,972. Both wire transfers are dated in March 2001. The petitioner's 1999 IRS Form 1120 at Schedule L, Line 22(b) shows the petitioner's common stock valued at $100,000 both at the beginning and the end of the year. The petitioner's 2000 IRS Form 1120 at Schedule L, Line 22(b) shows the petitioner's common stock valued at $100,000 at the beginning of the year and $200,000 at the end of the

year. The information on the petitioner's stock return coupled with a wire transfer from a party unrelated to the petitioner's alleged parent company indicates that a third party may own a controlling interest in the petitioner. The petitioner has not provided evidence that would explain or otherwise clarify this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this additional reason the petition will not be approved.

Additionally beyond the decision of the director, the petitioner has presented inconsistencies regarding its doing business for one year prior to filing the petition. 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 petition was filed August 12, 2002. The petitioner presented two bills of lading dated in August 2001 and two invoices dated prior to August 12, 2001. However, the petitioner has presented evidence that it first employed individuals including the beneficiary and two other employees in January 2002. The record does not show that the petitioner had hired employees prior to January 2002. The lack of employees casts doubt on the petitioner's ability to conduct business in a regular, systematic, and continuous manner for one year prior to filing the petition. The petitioner has not established that it was doing business for one year prior to filing the petition. 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.