

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4



FILE: WAC 03 108 54646 OFFICE: CALIFORNIA SERVICE CENTER Date: **APR 04 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

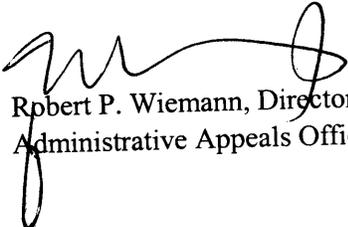
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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 preference 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 California limited liability company engaged in fabricating and assembling high precision broadcasting equipment and components to be used throughout the telecommunications industry. It seeks to employ the beneficiary as its managing director. 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 denied the petition based on the determination that the beneficiary would not be employed in a managerial or executive capacity and that the petitioner does not have the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 which 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.

The first issue in this proceeding is whether the beneficiary would be performing 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.

In support of the petition, the petitioner submitted a letter, dated February 17, 2003, with the following job description for the beneficiary:

In his current top-level position of Managing Director, [the beneficiary] is instrumental in developing and monitoring all aspects of our North American operations, which include responsibility for all aspects of formulating and maintaining business objectives and organizational policies and overseeing their implementation by our U.S. executives, developing the long and short-term goals for our North American subsidiary and overseeing their implementation by our U.S. executives, i.e. being in charge of planning, developing and establishing policies and goals for the U.S. company which are in accordance with those of the parent company and overseeing their implementation by our U.S. executives. In addition, [the beneficiary] is also instrumental in formulating marketing strategies and overseeing their

implementation by our U.S. executives, as well as guiding our technical planning and product design and overseeing its activities. [The beneficiary's] authority and responsibility also includes directing and coordinating all financial matters, providing funds for new and continuing operations, as well as seeking to maximize investment returns and increasing overall productivity. He is also entrusted with formulating and maintaining business objectives and organizational policies and for developing the long and short-term goals of [the petitioner].

Functioning autonomously, [the beneficiary] is responsible for managing and developing our financial, production and marketing strategies, policies and procedures in accordance with those of the parent company and overseeing their implementation by our U.S. executives. [The beneficiary] also exercises his authority to supervise [the petitioner's] employees and evaluates the performance of company executives with reference to established policies and procedures of the parent company.

In sum, [the beneficiary] has autonomous control over, and exercises wide latitude and discretionary decision-making in establishing the most advantageous courses of action for the successful management and direction of our international development activities.

The petitioner also submitted an organizational chart naming seven people, including the beneficiary, who was identified at the top of the petitioner's organizational hierarchy. The chart indicated that the beneficiary's three immediate subordinates include a marketing director, a technical director and an administrative director. The chart also named an account executive, technical worker chief, and an administrative assistant at the lowest level of the petitioner's hierarchy.

On November 3, 2003, the director issued a request for additional evidence instructing the petitioner to submit a more detailed description of the beneficiary's job duties and the job duties of his subordinates. The petitioner was asked to indicate the percentage of time the beneficiary would spend performing each of the listed duties. The director also requested another organizational chart illustrating the petitioner's managerial hierarchy and staffing levels.

In response, the petitioner submitted a letter dated January 21, 2004 containing the following list of the beneficiary's proposed duties and responsibilities:

- Determine the company's goals and direction—in essence, [the beneficiary] charts the blueprints for the company's business. He decides what our research and development department needs to research and develop, what markets the marketing department ought to pursue, etc.
- Set all company policies and oversee their implementation.
- Coordinate all aspects of the business to match the goals and direction of the parent company.
- Act as a liaison with major clients—[the beneficiary] is the face and voice of the company—[sic] His approval is required on all contractual agreements binding the company and his decisions are final.

- Develop work plans with deliverable milestones to achieve the desired business development—Set goals and deadlines for all departments—[sic] all department heads must report to [the beneficiary].
- Oversee technical design functions to assure that they meet the needs of the current market conditions and that they can be accomplished within the set budgetary confines.
- Coordinate the operations of the departments to make sure that there is adequate communication between them and resolving any conflicts that may arise.
- Last but not least, [the beneficiary] chose the location of our business to facilitate interaction with our suppliers and personally chose and hired all department heads.

The petitioner resubmitted the organizational chart that was previously provided in support of the petition. In addition, the petitioner provided its quarterly wage report for the first quarter of 2003, which names the individuals the petitioner employed at the time it filed the I-140 petition in February of 2003. The report named a total of eight individuals and specified the number of people employed during each of the three months that comprised that quarter. The report indicated that six employees were employed at the time the petition was filed, and five employees were employed in January and March of that quarter. Based on the salaries reported in the quarterly wage statement, the petitioner had three full-time employees at the time the petition was filed—a managing director (filled by the beneficiary), a marketing director, and an administrative director. The respective salaries earned by the technical director, the technical worker chief, and the administrative assistant indicate that these employees were employed on a part-time basis. The petitioner did not provide detailed job descriptions for any of the petitioner's other employees.

On April 7, 2004, the director denied the petition concluding that the record does not establish that the beneficiary would primarily perform managerial or executive duties. The director noted that beneficiary's subordinates cannot be deemed managers "because *they* are not managing professional employees." (Emphasis added in original). However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a professional employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. However, the beneficiary may not be disqualified based on the conclusion that he does not manage supervisory or managerial employees where the sole basis for such reasoning is that the second tier of managers supervises the petitioner's non-professional employees.

On appeal, counsel submits a brief asserting that the director erroneously relied on the petitioner's small staff to reach the conclusion that the beneficiary would not primarily perform duties of a qualifying nature. While the director may not solely rely on the size of the petitioner's staff in determining a beneficiary's eligibility for classification as a multinational manager or executive, the director may and should consider this factor for the purpose of determining whether the petition employs someone to relieve the beneficiary of having to perform the daily operational tasks. It is noted that 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). While it is true that the AAO will look first to the petitioner's description of the job duties when examining the executive or managerial capacity of the beneficiary, those job duties must be considered in light of the petitioner's organizational structure. See 8 C.F.R. § 204.5(j)(5). This cannot be properly done without taking into account the number of employees that comprise the support staff and the job duties that they perform.

Counsel further states that the petitioner has not reached a stage of development "where it could dispense with the one individual who is shaping its success." However, regardless of how indispensable the beneficiary's services are for the success of the petitioning entity, this factor does not relieve the petitioner of its burden of establishing the nature of the beneficiary's duties. In the instant case, the petitioner has described the beneficiary's duties by using terminology that is general and does not convey an understanding of what the beneficiary does on a day-to-day basis. In the petitioner's first description of the beneficiary's job duties, the petitioner indicated that the beneficiary formulates goals and policies, as well as marketing strategies whose implementation he oversees. In the subsequent description of job duties, which was submitted in response to the director's request for evidence, the petitioner again reiterated the beneficiary's discretionary powers over the company's goals and policies. However, reciting the beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

Counsel claims that the director's conclusion that the beneficiary performs "menial tasks" is baseless and states that the beneficiary's job description does not support the director's determination. While counsel is correct in stating that the beneficiary's job description does not suggest that the beneficiary performs non-qualifying tasks, the description of duties, as stated above, lacks the details necessary to affirmatively determine that the beneficiary's duties are primarily managerial or executive. Counsel attempts to provide greater detail about the beneficiary's duties by stating that the beneficiary does not perform any of the manufacturing, marketing, or sales functions, all of which are performed by other staff. However, since the petitioner failed to provide detailed job descriptions for anyone but the beneficiary, the AAO cannot determine which employees perform which duties. In light of counsel's claim that the petitioner's support staff actually performs the daily operational tasks, the petitioner must inform CIS as to the specific duties performed by each of its employees. It is noted that the record is unclear as to which individuals perform the marketing and sales functions, both of which are tasks the beneficiary is said to oversee.

On review of the evidence of record, the petitioner has failed to establish that the beneficiary would primarily perform managerial or executive duties. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that the beneficiary would otherwise be relieved from performing non-qualifying duties. Although claimed otherwise by counsel, the petitioner has not provided enough information to indicate what the beneficiary's subordinates would be doing and how they would relieve the beneficiary from performing non-qualifying tasks. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage of \$50,000 per year as indicated in the petition and in the letter submitted in support of the petition.

8 C.F.R. § 204.5(g)(2) states the following, in pertinent part:

Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In support of the petition, the petitioner submitted a number of quarterly tax returns leading up to, but not including, the date the petition was filed. As such, the director instructed the petitioner to submit additional documentation, including the petitioner's tax returns for 2002 and 2003, as well as the petitioner's quarterly tax return, which would account for the wages paid by the petitioner during the first quarter of 2003, the time period during which the petition was filed.

The petitioner's response included the requested quarterly tax return and its full tax return for 2002.

In the denial the director analyzed the petitioner's tax return and noted that its negative assets and negative income for that year were both indicative of the petitioner's inability to pay the beneficiary's proffered wage.

On appeal, the petitioner submitted the beneficiary's W-2 wage and tax statements for 2002 and 2003 indicating that the beneficiary's gross wages for 2002 were \$49,999.92, and for 2003 his gross wages were \$43,749.93. While these documents clearly indicate the petitioner's ability to pay the beneficiary's proffered wage in 2002, the same is not true of 2003, the year in which the petition was filed. The beneficiary's W-2 wage and tax statement for 2003 falls more than \$6,000 short of the proffered wage. As such, the AAO concludes that the petitioner failed to establish its ability to pay the beneficiary's proffered wage at the time of the filing of the petition. For this additional reason, this petition cannot be approved.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence establishing that the beneficiary's foreign employer was doing business at the time the petition was filed.

The regulation at 8 C.F.R. § 204.5(j)(2) states that "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. In the instant case, while the record contains a handful of sales invoices naming the foreign entity as the receiving party of various merchandise, all of the invoices reflect transactions that took place in 2002. The petitioner did not submit documentation to reflect any sales transactions by the foreign entity beyond September 15, 2002. Thus, there is no evidence to establish that at the time of the filing of the petition, the petitioner was a multinational entity conducting business in two or more countries where the United States is one of the countries. *See* 8 C.F.R. § 204.5(j)(2).

Also beyond the director's decision, the petitioner has not provided an adequate description of the beneficiary duties abroad such that the AAO can affirmatively determine that the beneficiary had been employed abroad in a qualifying capacity for at least one of the three years prior to filing the petition. As previously stated, the petitioner must provide sufficient information about the beneficiary's foreign job duties in order to allow for CIS to determine what specific tasks the beneficiary was primarily carrying out. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1108. The petitioner's failure to provide this information precludes the AAO from determining that the beneficiary was employed abroad in a qualifying capacity for the requisite time period.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds discussed in the above paragraphs, this petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.