



U.S. Department of Justice  
Immigration and Naturalization Service

B4

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: [Redacted] Office: TEXAS SERVICE CENTER

Date: DEC 24 2002

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)

IN BEHALF OF PETITIONER:



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prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

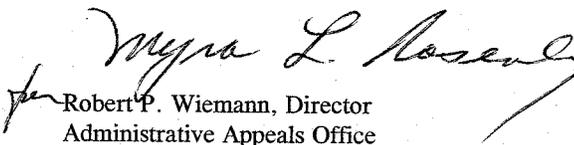
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

  
for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1969 in the State of Alabama and is claimed to be a subsidiary of Intergraph India, Pvt., located in India. The petitioner seeks to employ the beneficiary as a software consultant. Accordingly, the petitioner has petitioned 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 determined that the petitioner had not established that the beneficiary had been and will be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a brief disputing the director's findings. The petitioner did not submit any new evidence in support of the appeal.

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. 8 C.F.R. 204.5(j)(5).

The issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties.

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 asserts that the beneficiary qualifies as a manager in accordance with the definition set forth by the statute. To qualify under this preference visa classification, a managerial employee must either supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function within the organization, or a department or subdivision of the organization. Furthermore, if the beneficiary does not supervise other employees, the beneficiary must function at a senior level within the organizational hierarchy or with respect to the function managed. 8 C.F.R. 204.5(j)(2).

In support of the petition, the following statements were provided describing the beneficiary's past and proposed job duties:

Past job duties:

As Project Leader, under minimum supervision, he planned, conducted and provided leadership for programming and software and software assignments in the development of company products. He applied his thorough knowledge of software principles, theories and concepts to the solution of difficult assignments and coordinated the assignments of various subordinate and professional group members. His assignments were involved in areas such as designing and writing compilers, assemblers, user interfaces, databases, graphic tools, network communications and/or application software developed by the company.

Proposed duties:

The position of Software Consultant is a managerial one and Mr. Hota will be filling this position on a permanent basis for the company. . . . He is responsible for project management application for Global Shipbuilding CAD and has been since his arrival in the United States. The project management provides for conducting a variety of programming/software assignments and the development of company software products in this area. He works under limited supervision and has broad discretion in this position. He will be called upon to assist as a team leader and at various times, will be involved in the supervision of other degreed professionals in his work.

In the Software Consultant Position, this responsibility will become even more senior, where he will perform services with independent discretion.

On January 31, 2002, the Service issued a notice requesting that the petitioner submit additional evidence. Namely, the petitioner was instructed to provide detailed descriptions of the



beneficiary's positions, both in the United States and abroad. The petitioner was also asked to include the percentage of time spent performing each duty.

The petitioner's response included the following description of the beneficiary's duties in the United States:

 works on a project which is divided into smaller modules and he is responsible for certain of these modules. He oversees this portion of the project. His work includes allocation of job duties and monitoring of work by subordinate professional computer personnel. . . .

His work is divided as follows:

Software design - 25%

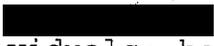
Assigning work and monitoring progress of work - 15%

Review work products of team members - 20%

Provide technical guidance - 20%

Coding - 20%

\* \* \*

. . .  does not have authority to hire and fire these individuals; however, he does provide reports to me and other managers concerning the performance of these individuals. . .

. His assessment is given weight and is utilized in writing out actual performance reviews with related personnel action in part considering Mr. Hota's views about the individual in question.

\* \* \*

. . . In his previous position, at the time of his departure, he was supervising six professional computer related employees including Software Analysts and Senior Software Analysts. . .

. He had supervisory duties in allocating work to subordinates, monitored their progress, tracked their work schedule, and reviewed work product created by them. He provided technical guidance and interviewed suitable candidates for these positions.

The director denied the petition, concluding that the petitioner did not clearly establish that the beneficiary was employed in a primarily managerial or executive capacity or that his U.S. employment is primarily managerial or executive in nature. Based on the evidence submitted, the director concluded that the beneficiary has been and will continue to primarily perform tasks that are necessary to produce the products and services of the organization. The director further noted that the beneficiary did not have the authority to hire and fire the employees purportedly under his supervision. Consequently, the director determined that

the beneficiary has not been and will not be employed in a primarily managerial capacity.

One of the points brought up by counsel in his brief is that the director has used the beneficiary's position title to determine the nature of the duties performed. Counsel's argument, however, is not persuasive. The beneficiary's position title had no bearing on the director's conclusion. As instructed in 8 C.F.R. 204.5(j)(5), the director first reviewed the petitioner's description of the job duties and drew his conclusion based on the petitioner's description. The director restated each of the beneficiary's duties that were previously listed by the petitioner and concluded that most of the beneficiary's time will be spent performing nonqualifying tasks. Specifically, the director noted that the beneficiary was spending a large portion of his time performing software design and coding. As noted by the director, 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 further maintains that the director assumes facts that are "not contained in the record or supported by the evidence and fails to consider the duties performed by the beneficiary . . . ." Once again, counsel's argument is without merit. The director was careful to restate, verbatim, the beneficiary's duties, and goes on to give that list of duties primary consideration in his denial.

Regarding the merits of the case, counsel asserts that beneficiary qualifies as a manager, as the employees supervised by the beneficiary are professionals with each possessing at least an undergraduate degree. However, this claim is not supported by the record. Although the director requested a list of the positions supervised by the beneficiary, a description of their duties, and a statement as to the level of each employee's education, the petitioner declined to submit this evidence either in response to the director's inquiry or on appeal. A failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. 103.2(b)(14). For this reason alone, the petition may not be approved. Simply 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).

Further, even if the Service were to conclude that the employees qualify as professionals, this element alone is not sufficient to establish that the beneficiary's job duties are of a primarily managerial capacity. In accordance with the statutory definition of manager, the petitioner must establish that the beneficiary has the authority to hire and fire the employees or recommend those as

well as other personnel actions. Section 101(a)(44)(A)(iii) of the Act. In response to the director's request for evidence, the petitioner specifically stated that the beneficiary did not have the authority to hire or fire employees, but instead provides reports and "informal reviews" to the firm's managers that are utilized in "writing out actual performance reviews." The record is silent as to whether the beneficiary has the authority to recommend the hiring and firing of the employees that are claimed to be under his supervision. The petitioner's statements convey no clear indication that the beneficiary possesses any real authority to take or even to recommend personnel actions.

It is further noted that the petitioner has not established that the beneficiary is functioning at a senior level within the organizational hierarchy. While the petitioner indicated that it employs a total of 3,000 employees, it did not submit a copy of an organizational chart or otherwise explain the beneficiary's position within the corporation. Instead, the petitioner indicated that the beneficiary is responsible for small "modules" on one of the firm's projects. The petitioner further disclosed that the beneficiary is supervised by a "Senior Manager - Technical." Due to the lack of evidence, it is not clear where the beneficiary fits into the organizational structure. It is not clear whether the beneficiary reports to a team leader, a project manager, the manager of a department, or to an executive in the upper level of the petitioner's organization. Notwithstanding the beneficiary's claimed supervisory duties, the petitioner has not established that the beneficiary functions at a senior level within the organization or with respect to any essential function. Based on the evidence submitted, the beneficiary appears to be a senior software analyst staff member, without managerial duties, who in turn is supervised by a first-line manager. As such, the beneficiary's capacity does not rise to the level of a managerial position.

Beyond the decision of the director, it is noted that the record contains the Service's approval notice for the petitioner's request to classify the beneficiary as an L-1B specialized knowledge nonimmigrant. While the Service's prior actions have no bearing on actions taken in the instant proceeding, the fact remains that up to now, the beneficiary has been classified not as an L-1A manager or executive, but as an L-1B intracompany transferee possessing specialized knowledge. See 8 C.F.R. 214.2(l)(1)(ii)(D). This classification does not carry the burden of having to prove that the beneficiary manages or directs people or functions and refrains from performing the petitioner's daily operational tasks. Rather, a nonimmigrant with an L-1B classification is free to perform such operational tasks, as long as those tasks require specialized knowledge and the beneficiary is established as having such knowledge. There is no indication in the record that beneficiary's job will be significantly different as a multinational manager from what it was as an employee with specialized knowledge.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. Rather, the record indicates that almost half of the beneficiary's time will be spent performing software design and coding, both of which are necessary to produce the petitioner's product or service and therefore cannot be deemed as qualifying.

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. The petitioner has not demonstrated that the beneficiary possesses the discretionary decision-making authority to hire and fire personnel or recommend that such actions be taken. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. 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 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.