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U.S. Department of Justice

Immigration and Naturalization Service

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



File: WAC 98 209 50003

Office: CALIFORNIA SERVICE CENTER

Date: 29 JAN 2002

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:



Public Copy

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California corporation that is engaged in purchasing, marketing, selling and servicing computer-related products. It seeks to employ the beneficiary as its vice president of the technical services department and, therefore, endeavors to classify the beneficiary as a multinational manager or executive 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 denied the petition because the record did not support a finding that the petitioner (1) had been doing business for at least one year at the time it filed the I-140 petition, and (2) that it currently employs and would continue to employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel submits a brief and additional evidence.

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.

I. DOING BUSINESS

One basis for the denial of the petition was the director's conclusion that the petitioner had not been doing business for at least one year at the time it filed the I-140 petition. The director based her decision on the petitioner's failure to submit requested sales receipts and copies of sales contracts in order to show that the petitioner was conducting business.

On appeal, counsel states that the petitioner has been doing

business for eight years and notes that the petitioner previously submitted copies of its payroll records, bank statements, tax returns, a business license, phone bills and audited financial statements. In response to the director's stated reasons for denial, counsel notes that "[t]here has never been a requirement that sales contracts, sales invoices, etc. be provided to prove a company's provision of goods and/or services."

According to 8 C.F.R. 204.5(j)(2), *doing business* is defined as "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." Counsel's statements on appeal, and the evidence already included in the record, are sufficient to demonstrate that the petitioner had been engaged in the regular, systematic and continuous provision of goods and/or services for at least one year prior to the filing of the petition. Therefore, the petitioner has overcome this portion of the director's objections.

II. MANAGERIAL/EXECUTIVE CAPACITY

The second basis for the director's denial of the petition was that the evidence failed to demonstrate that the beneficiary is currently working and would continue to work in a primarily executive or managerial capacity. In her denial notice, the director noted evidence that the petitioner submitted, which indicated that the petitioner shared office space with another company, [REDACTED]. The director found that she could not determine that the beneficiary was performing managerial duties because "the petitioner's staff is intertwined with that of the [REDACTED] organization . . ."

On appeal, counsel describes the beneficiary's educational and employment background, and notes that the petitioner has employed the beneficiary in L-1A nonimmigrant status. Counsel also describes the beneficiary's position with the organization, which includes "the management and direction of the Product Development Department," and notes that the beneficiary supervises one senior engineer and a senior lab technician. Counsel further states that the beneficiary has been given the authority to hire an additional four engineers/technicians. Counsel maintains that the director's decision should be reversed, as it was based upon an erroneous finding that the staffing level of the petitioner could not be determined.

Counsel has not presented a persuasive argument on appeal. As shall be discussed, the evidence of record does not support a finding that the beneficiary currently works and will continue to work primarily as an executive or manager.

A. EXECUTIVE CAPACITY

In order to be found eligible for this immigrant visa classification as an executive, the record must clearly show that the beneficiary primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

See. 8 C.F.R. 204.5(j)(2).

The petitioner is offering the beneficiary the position of Vice President of the Technical Services Division, and describes the beneficiary's duties as follows:

. . . direct and develop [the] technical services function of the corporation; direct new product development and marketing functions of the company; decide operational policies and procedures for [the] Technical Services Department; hire/fire professional engineers of the Department and supervise their work; represent company to discuss and coordinate with customers to define specifications and resolve technical problems; exercise discretion over other day-to-day operation[s] relating to the technical service function of the company. In that capacity, [REDACTED] will receive supervision only by the President of the company.

The petitioner's job description for the beneficiary fails to establish that the beneficiary directs the management of a major component or function of the organization. The petitioner's vague description of the beneficiary's duties as "direct and develop [the] technical services function of the corporation" does not provide the detail that the Service requires to determine that the job responsibility is primarily executive. For example, in order to direct and develop technical services, the beneficiary may perform duties that are both executive and non-executive in nature. By failing to delineate the beneficiary's job responsibilities between executive and non-executive functions, the petitioner does not satisfy the Service that the primary amount of the beneficiary's time as the vice president of the

technical services department would be spent executing executive tasks. In Republic of Transkei v. INS, 923 F.2d 175 (D.C. Cir. 1991), the court upheld the Service's denial of a nonimmigrant L-1A petition because the petitioner failed to document what proportion of the beneficiary's duties would be managerial/executive functions and what proportion of the duties would be non-managerial/non-executive functions.

Furthermore, although the petitioner states that the beneficiary "direct[s] new product development and marketing functions of the company," the petitioner's organizational chart indicates that it currently has a sales and marketing department that is led by an individual other than the beneficiary. Thus, the petitioner has not clearly explained how the beneficiary directs the marketing activities when it currently employs an individual in that capacity.

Accordingly, the petitioner fails to establish that the beneficiary merits classification as a multinational executive.

B. MANAGERIAL CAPACITY

In order to be found eligible for this immigrant visa classification as a manager, the record must clearly show that the beneficiary primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

See. 8 C.F.R. 204.5(j)(2).

The petitioner also fails to show that the beneficiary currently

functions and will continue to function primarily as a manager. As previously stated, the petitioner has not explained, with any degree of detail, how the beneficiary manages the petitioner or a function of the petitioner by merely stating that the beneficiary directs the technical services division. Furthermore, the petitioner states that the beneficiary "discuss[es] and coordinate[s] with customers to define specifications and resolve technical problems." This particular job duty is one that is normally associated with an engineer or technician, not an individual who works primarily in a managerial capacity.

Furthermore, there is no evidence that the beneficiary supervises managerial, supervisory or professional employees. Although the petitioner lists the employees who are subordinate to the beneficiary as an engineer and a lab technician, the petitioner has not presented any evidence that either position is professional, such as a comprehensive job description for each position and evidence of each individual's educational credentials. Therefore, the petitioner also has not met its burden of establishing that the beneficiary is currently employed and would continue to be employed in a primarily managerial capacity.

Finally, counsel suggests on appeal that this petition should be approved because the beneficiary was previously granted nonimmigrant classification as an L-1A nonimmigrant manager/executive. The Service notes that the merits of each petition are evaluated on the basis of the evidence provided with that particular petition. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001).

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 met that burden.

ORDER: The appeal is dismissed.