



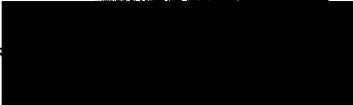
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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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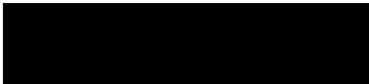


File: WAC 99 053 52261

Office: CALIFORNIA SERVICE CENTER

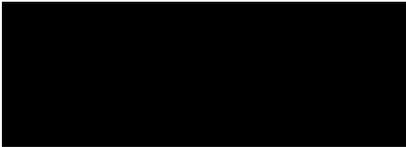
Date: 23 MAY 2002

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

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DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a sole proprietorship doing business under the name of Mega Semiconductor since March of 1996. The petitioner claims to be a branch office of Advanced Semicon Engineering Ltd. The petitioner is an importer and exporter of semiconductors. The petitioner seeks authorization to employ the beneficiary as a multinational executive or manager pursuant to § 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 evidence submitted for the record failed to establish that the beneficiary had been or would be employed in an executive or managerial capacity.

On appeal, counsel asserts that the director's decision is not reasonable or accurate.

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.

The primary issue in this proceeding is whether the beneficiary has been and will be 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 described the beneficiary's prospective duties in the petition as follows:

As president of the U.S. affiliate company, directs and coordinates management and operation of the U.S. affiliate company. Plans, develops, and establishes business policies and objectives. Review analysis, costs, operations and forecasts data to determine progress toward the goals and objectives. Prepares monthly report to parent company in Korea.

On November 10, 1999, the director instructed the petitioner to submit further evidence to establish that the beneficiary had acted, and would continue to act, in an executive or managerial capacity.

In response, the petitioner provided a statement by counsel that indicated:

[The] beneficiary was employed by the foreign entity [Advanced Semicon Engineering Ltd.] as a Director (executive position) from April, 1990 through December, 1996. Company policies and business objectives were decided by Board of Directors consisting of five directors. Each director served as the President for the company for three years in turn. Therefore, the beneficiary served in a top executive capacity for the foreign entity during the three years preceding his entry to the United States.

Counsel also re-stated the beneficiary's duties as set out in the petition. Counsel also provided an organizational chart for the foreign entity. Counsel further provided a list of job titles for the foreign entity with the duties of four employees listed. Counsel finally provided an organizational chart for the petitioner showing the beneficiary as the president. The chart also listed an executive director in charge of sales and marketing, product development, process application and customer consulting. The chart also identified a manager in charge of customer support, technical service and product application. The chart further noted a manager in charge of shipping and receiving, importing and exporting and customs clearance. The chart finally named a secretary in charge of administration, accounting and price quotation.

The director determined that the import and export industry does not involve or require "professional" employees and that the petitioning organization operated on a small scale. The director also determined that the beneficiary as president would essentially operate as a first-line supervisor over four non-professional employees of a small operation. The director further

determined that given the type of business that the petitioner conducts, it was unreasonable to believe that the beneficiary, as the president, would not be involved with the day-to-day non-supervisory duties that are common place in the import and export industry. The director concluded that the petitioner had not established that the beneficiary's duties would be managerial or executive in nature.

On appeal, counsel for the petitioner stated on the Form I-290B (Notice of Appeal) that:

Even though the Beneficiary operates the petitioning entity with four employees, each employee's duties and job description are professional in nature. Center Director adjudicated this petition solely based on the number of employees working for the beneficiary. [The] beneficiary's duties as president for the petitioning organization come within the meanings and ambit of Title 8, Code of Federal Regulations, Part 204.5(j)(2). Center Director's analysis that "The import/export industry does not involve or require 'professional' employees" is not reasonable and accurate in view of marketing high-tech products such as semiconductors or computer products.

Counsel submitted no other brief or evidence in support of the appeal.

Counsel's assertions are not persuasive. The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. Counsel's assertions as to the beneficiary's job duties for the foreign entity do not constitute evidence. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980).

In addition, the record is not convincing in demonstrating that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of job duties is vague and general in nature. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization rather than primarily participating in the day-to-day performance of non-qualifying duties.

Despite counsel's assertion that each of the petitioner's employee's duties and job description are professional in nature, the job descriptions provided by the petitioner are too general to come to this conclusion. Section 101(a)(32) of the Act states that the term "profession" shall include but not be limited to

architects, engineers, lawyers, physicians, surgeons, and teachers. According to the petitioner's description of its employees job duties, the executive director appears to be involved in sales, one manager is involved in customer support and technical service, the second manager is involved in importing, exporting and customs clearance and the fourth employee is involved in clerical and other administrative work. These job descriptions do not appear to involve the professional attributes envisioned by the statute.

Although the director based her decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. At the time of filing the petition, the petitioner employed the beneficiary as president and four non-professional employees. It is noted that each of the four employees possessed managerial or executive titles. The petitioner did not provide a comprehensive description of the day-to-day activities of its employees. Based on the insufficiency of the job descriptions, the Service cannot conclude that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and four executive or managerial employees. Regardless, the reasonable needs of the petitioner serve only as one factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

On review of the record, the petitioner has not established the beneficiary has been or will be employed in a primarily managerial or executive capacity. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title.

Beyond the decision of the director, the nature of the petitioner's business also presents an obstacle to the petition's approval. As a matter of law, there is no prospective United States employer which could be considered the "same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas." 8 C.F.R. 204.5(j)(3)(i)(C). The United States petitioner is a sole proprietorship doing business as [REDACTED]. There is no evidence, nor is there any claim, that the petitioner in this matter is a corporation, partnership, or other legal entity which would have a legal identity separate and apart from the owner, since, in a sole proprietorship, "[t]he business and the

proprietor are one." In re Drimmel, 108 Bankr. 284, 286-87 (Bankr. D. Kan. 1989). For immigration purposes, a sole proprietorship is not a legal entity separate and apart from its owner. Matter of United Investment Group, 19 I&N Dec. 248 (Comm. 1984). In addition, the petitioner uses conflicting language by describing itself as a "branch" and an "affiliate" of the claimed foreign entity, two completely different types of relationships, and also in contradiction of the evidence that demonstrates it is a sole proprietorship. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

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.