

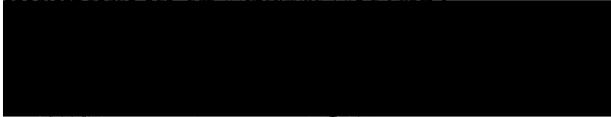


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U.S. Department of Justice

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: [Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: NOV - 6 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 visa petition was approved by the Director, Vermont Service Center. Upon subsequent review, the director properly issued a notice of intent to revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in international trade. It seeks to employ the beneficiary as its vice-president. Accordingly, it seeks 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 initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary had been and would be employed in a primarily managerial or executive capacity. After properly issuing a preliminary notice of intent to revoke, the director revoked the approval of the petition on May 15, 2001.

On appeal, counsel for the petitioner asserts that the Service decision is in error and submits additional documents in support of the petitioner's 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.

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 petitioner was incorporated in the State of New York in August of 1996. The petitioner claims it is a wholly-owned subsidiary of a Chinese company.

The issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily 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 initially described the beneficiary's responsibilities as follows:

1. Overall supervising the day-to-day operation of the company as acting president, the president works in China.
2. Supervising the international trade through Senior Assistant (manager equivalent) in terms of quality control and sales promotion.
3. Coordinating parent company in implementing business goals and guidelines set up by parent company.
4. Budgeting sales and related expenses, supervising sales and administrative activities.
5. Recruitment & training of high level employees.
6. Evaluating operational results, consolidate sales and income.
7. Making periodic report and suggestions to the president.

The petitioner also provided an organizational chart depicting a president who worked in China, the beneficiary as vice-president, a senior assistant, a specialist, a secretary, an inspector, a bookkeeper, and sales representatives on a commission basis.

It is noted that the petitioner never clarified whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the notice of intent to revoke, the director requested a complete position description for all of the petitioner's employees, including one for the beneficiary's position. The director also requested evidence documenting the number of contractors the petitioner used.

In response, the petitioner submitted a description of its job positions. The list included the president, the beneficiary's position as vice-president, senior assistant, assistants, an inspector, a secretary/bookkeeper, and a sales representative. The beneficiary's job duties were described as follows:

Indirect supervision of the day-to-day operation, through the help of two Senior Assistant [sic] and serve as Acting President when the president is not in the U.S. (10 hr) [sic] Supervising international trade through senior assistant by meeting and discussion one hour a day (5 hr). coordinating [sic] parent company in implementing business goals (5 hr) [sic] faxing or emailing first and following telephone conversation; budgeting sales and related expense (5 hr); Training & Recruiting high ranking employees (5 hr); Evaluating operational results (5 hr). Making periodic report to president/corporate parent and participating at local association and various of baris [sic] (5 hr).

The petitioner also provided a description of the senior assistant position as follows:

First line of day-to-day operation of the subordinates (10 hr) meeting/reporting to (voice) [sic] president (5 hr). Assignment of the work (5 hr). developing [sic] and expanding of the sales (10 hr). Training & Recruiting [sic] of new employees (10 hr).

The director determined that the documentation submitted did not show who performed the preponderance of the mundane duties required to support and execute the international trade activities described in the petition. The director concluded that the record was not persuasive in demonstrating that the beneficiary had been or would be employed in a primarily executive or managerial capacity, or that the petitioner could support such a position.

On appeal, counsel asserts that the Service erred in making its decision. Counsel also asserts that the beneficiary has a senior assistant to relieve her from day-to-day supervision. Counsel further asserts that if judged solely by the size of the company, the beneficiary is at least working in a managerial capacity. Counsel also submits the petitioner's description of the beneficiary's typical day. The description includes checking the calendar and email, responding to important email, meeting with the senior assistant and attending different internal meetings, reviewing documents and reports, contacting executives of key accounts, browsing the web, doing paperwork or business reading, reviewing the schedule for the next day and calling executives overseas.

Counsel's assertion that the Service erred in its decision is not persuasive. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner provided a broad description that vaguely refers, in part, to duties such as "supervising the day-to-day operation of the company," and "supervising international trade through a senior assistant," and

"coordinating [with the] parent company in implementing business goals and guidelines." The Service is unable to determine from these general statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. In addition, budgeting sales and expenses and evaluating operational results are tasks more indicative of an individual performing the basic operations for the petitioner. 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).

Although, the petitioner provided a weekly breakdown of the beneficiary's duties in response to the director's notice of intent to revoke, the petitioner did not expand or clarify the beneficiary's job duties but basically re-stated the previous position description.

Counsel's assertion that the petitioner's senior assistant relieves the beneficiary from performing day-to-day supervision is without merit. 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). The petitioner's description of the senior assistant's duties does not contribute to a finding that the beneficiary would be primarily performing in an executive or managerial capacity. The description provided is also vague and does not convey a complete understanding of what the senior assistant does on a daily basis. For example, the description of the senior assistant's job duties includes "[f]irst line of day-to-day operation of the subordinates," and "meeting/reporting to (voice) [sic] president," for five hours. It is unclear what first line operation of subordinates means. It is also unclear what is covered at the meeting(s) with the vice-president. Further, the petitioner indicates that both the beneficiary and the senior assistant recruit and train employees, accounting for five hours of the beneficiary's time per week and ten hours of the senior assistant's time per week. However, the petitioner's employment records reveal little turnover of employees in the years 1998, 1999, and 2000, thus leaving no new employees to recruit and train on a sustained basis. The petitioner also has not substantiated that recruiting and training new employees is a managerial or executive function. The record does not establish that the beneficiary is relieved from performing non-qualifying duties by her senior assistant or other employees.

Counsel's submission of the tasks performed by the beneficiary in her typical day is also vague and general in nature. The petitioner does not sufficiently relate the beneficiary's daily tasks to any elements defined as managerial or executive. Again, it is not possible to determine from the statements made regarding the beneficiary's daily tasks whether these tasks are managerial



or executive in nature or whether the beneficiary is performing the basic operational tasks necessary to continue the trading services of the petitioner.

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision, or component of the company. Further, the record does not adequately demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity for the United States company.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.