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Immigration and Naturalization Service

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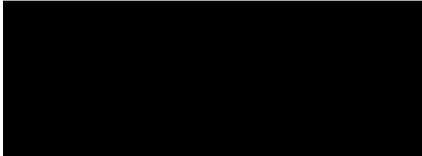
Date: NOV - 6 2002

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

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

The petitioner is a New Jersey corporation that claims to be engaged in computer networking, computer systems support, software development, and sales and services of computer systems. It seeks to employ the beneficiary as its vice-president of technical services. 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 determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the United States entity.

On appeal, the counsel for the petitioner asserts that the evidence submitted was not adequately considered.

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 issue in this proceeding is whether the petitioner has

established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

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 submitted a letter that listed the beneficiary's functions and the proportionate amount of time spent on each of the functions as follows:

- Managing and supervising all technical areas of the organization - 20%
- Supervision, training, and control of work including schedule management of Engineers - 10%
- Decision making for hiring, firing, promoting, and leave of Technical employees - 5%
- Managing daily operations and delegation of work - 20%
- Design and planning of customer LAN/WAN infrastructure - 10%
- Vendor development and hardware/software materials sourcing for projects - 5%
- Customer technical requirements assessment and development - 10%
- Customer project initiation, implementation and management, and customer relations - 10%
- Partner Certification from Industry Leaders (Cisco & Microsoft), including negotiation of joint marketing agreements - 5%

The petitioner also stated in the initial letter of support that the beneficiary functioned in both an executive and managerial capacity. The petitioner further stated that the beneficiary had been successful in obtaining and implementing numerous contracts and was also directly involved in the planning and design management of projects. The petitioner noted that other engineers provided the actual fieldwork.

The director requested additional evidence demonstrating the beneficiary would be employed in a managerial or executive capacity, including a list of the petitioner's employees and position descriptions for each employee. The director also requested the petitioner's organizational chart.

In response, the petitioner stated that the beneficiary performed a combination of managerial and executive duties and then provided a similar list of functions as described above. The petitioner added that in addition to managing and supervising the technical areas of the organization, the beneficiary also managed and supervised all sales. In addition, the beneficiary inspected client documentation as well as designing and planning customer LAN/WAN infrastructure. The petitioner further explained that the beneficiary delegated work to managers.

The petitioner also provided its organizational chart depicting a

president, the beneficiary's position of vice-president, and a sales and marketing manager, a systems analyst and a technical support manager. The chart showed the three managers reporting to the vice-president. The chart also included a business analyst and a system engineer joining the enterprise on October 15 of an unidentified year. The petitioner also included brief job descriptions for the positions listed on the chart.

The director determined that the beneficiary would not be acting in a primarily executive or managerial capacity. The director noted the small size of the office and the petitioner's description of the beneficiary's job duties and concluded that the beneficiary would be primarily involved in the daily operations of the office and in first-line supervisory duties.

On appeal, counsel for the petitioner asserts that the beneficiary is acting in an executive capacity for the petitioner and that the petitioner has provided an exhaustive list of the beneficiary's executive functions. Counsel also states that the requirement of a staff is not implicit in the definition of executive capacity. Counsel also asserts that the Service must consider the reasonable needs of the organization when considering the number of employees with the organization and that the director disregarded this requirement. Counsel further asserts that the beneficiary is performing a combination of managerial and executive functions. Counsel finally asserts that the past approval of the beneficiary in an L-1A classification should form the basis of an approval of this petition.

The petitioner claims that the beneficiary will be performing both executive and managerial functions. Although counsel makes this same assertion, counsel appears to be relying on the claimed executive nature of the beneficiary's position on appeal. Regardless, the petitioner must clearly establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties satisfy each of the four elements of the two diverse statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel's assertions are 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 position description that vaguely referred, in part, to duties such as "[m]anaging and supervising all technical areas of the organization," and "[m]anaging daily operations and delegation of work," and "[v]endor development and hardware/software materials sourcing for projects." 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. The job duties described by the petitioner do not convey an understanding of exactly what the beneficiary is doing on a daily basis.

Contrary to counsel's claim that the correspondence, invoices, contract proposals, and letters from clients to the beneficiary's attention are examples of the beneficiary's decision making capacity, the record indicates that the beneficiary is primarily performing the basic operations of the company. Regarding the actual operations of the enterprise, the description of the beneficiary's job duties demonstrates that the beneficiary is responsible for "[d]esign and planning of customer LAN/WAN infrastructure," and "[c]ustomer technical requirements assessment and development," and "[c]ustomer project initiation, implementation and management, and customer relations." Based on the record, the beneficiary is assessing the needs of the customer and designing the solutions as well as initiating the implementation of the solutions. The interaction of the beneficiary with the customers is also indicative of a consulting function.

Counsel's statement that the requirement of a staff is not implicit in the definition of executive capacity is correct on its face. However, the petitioner must still establish that the beneficiary is primarily employed in an executive capacity. To do so, the petitioner must demonstrate that the "executive" is primarily functioning in an executive capacity and is not primarily engaged in providing basic operational services to 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).

Counsel correctly notes that the Service must consider the reasonable needs of the organization in light of its overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity. Although the director based his decision partially on the size of the petitioner it is not apparent that he considered the organization's reasonable needs.

At the time of filing, the petitioner was a year and a half-old computer networking, systems support, and software development company. The firm employed a president, a vice-president, two managers, a system analyst, and a business analyst. As noted on the petitioner's organizational chart submitted after the filing of the petition, the systems engineer had not yet been hired. The record does not provide sufficient evidence regarding the subordinate employees and the performance of the day-to-day operations of the company to support a finding that the petitioner employed sufficient staff who could relieve the beneficiary from

performing the day-to-day operational duties of the petitioner at the time the petition was filed. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. 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.

Counsel's assertion that the past approval of an L-1A visa classification for this beneficiary requires approval of the instant petition is in error. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988).

The petitioner has not established that the beneficiary has been employed in either 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 an executive or managerial title.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed foreign entity. The petitioner has provided only its Articles of Incorporation to demonstrate its ownership and control. The Articles of Incorporation state that "Gold Systems and its subsidiaries through its partners, [the beneficiary and one other individual] will hold 50 % interest in [the petitioner]." It is not clear if the two partners hold the petitioner's shares individually or as a corporate or partnership entity. Ownership is a critical element of this visa classification, and the record is insufficient to support a finding that a qualifying relationship exists.

Also beyond the decision of the director, the petitioner has not adequately established its ability to pay the beneficiary the proffered wage of \$40,000 per year. See 8 C.F.R. 204.5(g)(2). The petitioner has provided pay stubs made out to the beneficiary for the first three months of the year 2001 in the amount of \$11,076. Whether the petitioner will continue to pay the beneficiary at the rate disclosed on the pay stubs is speculative. As the record does not contain other independent evidence of the petitioner's ability to pay the proffered wage, we cannot conclude that the petitioner has established its ability to pay.

As the appeal is dismissed for the reason stated above, these issues are not examined further.

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.