

B4

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

[Redacted]

File: [Redacted]
I-290B Receipt Number: SRC-02-212-50227

Office: TEXAS SERVICE CENTER

Date: APR 01 2003

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center denied the employment-based preference visa and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its president and general manager. The petitioner, therefore, endeavors 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 denied the petition on the ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel declines to submit a brief or additional evidence. Counsel states, in part, that the beneficiary will primarily be engaged in executive or managerial functions and that the director did not consider that the petitioner currently employs six individuals.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must

clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of [REDACTED] of Colombia; (2) sells and services heating and air conditioning equipment; and (3) employs six persons. The petitioner states that the beneficiary currently works for the overseas entity and it is offering to employ the beneficiary as its president and general manager on a permanent basis at a salary of \$1,150 per week.

The issue to be discussed in this proceeding is whether the proffered position is in an executive or managerial 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 describes the proffered position as follows:

[The beneficiary's] duties as President and [G]eneral Manager of our U.S.A. Corporation will include administration, marketing, organization, planning, directing, supervising and control of all corporation operations. This position requires that [the beneficiary]:

1. Plan, organize, supervise, control and direct [the petitioner] in accordance with the guidelines set by the company.
2. Negotiate prices with our buyers [and] providers and approve purchasing orders.
3. Oversee daily management of the company business.
4. Select, hire, train and direct personnel. Supervise employees and Vice-President.
5. Promote our corporation's name by having the most advanced technologies and equipment.
6. Maintain regular communication with our main company in Bogota, Columbia, giving monthly reports on the company['s] operations and financial status.
7. Train and direct the workers on the image that we are trying to promote for our corporation, as well as to keep them motivated.
8. Handle all management transportation and keep record[s] of [the] budget.

The petitioner also provided a breakdown of the percentage of time that the beneficiary would devote to his duties:

- (1) Supervision of the Administrative Manager, Secretary and Shipment Clerk. (10%)
- (2) Acting as liaison and representative for the petitioner's foreign parent in the U.S., negotiating prices with customers and providers. (10%)
- (3) Promoting and marketing the corporation's name by having the most advance[d] technologies and equipment and identifying business opportunities in the U.S. and international markets. (30%)
- (4) Negotiation of contracts, managing inventory and purchasing. (30%)
- (5) Maintain regular communication with [the] parent corporation. (10%)
- (6) Supervise all financial aspects of the company and set policies for the company. (10%)

In addition, the petitioner provided two organizational charts; one chart showed its current organizational structure; the other chart showed its proposed organizational structure with the beneficiary's position. According to first chart (current staffing levels), the petitioner employed one administrative manager who supervised one secretary and one shipment clerk. The second organizational chart (proposed staffing levels) showed that the beneficiary would serve as the president and general manager and would supervise the administrative manager, who, in turn, would continue to supervise the secretary and the shipment clerk. The petitioner did not submit job descriptions for its current employees.

The director was not persuaded that the proffered position was in an executive or managerial capacity. Therefore, in a January 15, 2002 request for evidence, the director asked the petitioner to submit information regarding the titles, duties and educational levels of all its employees, and evidence that the employees were on the petitioner's payroll.

In response, the petitioner stated that it employed four individuals in the positions of vice president/administrative manager, project manager, air conditioning mechanic, and secretary/shipping clerk. The petitioner stated that the vice president was responsible for duties such as contacting clients, negotiating contracts, attending seminars, and maintaining accounts receivable/payable. The project manager's job was described as visiting sites, coordinating between

subcontractors and contractors, and "design." The air conditioning mechanic's position was described as installing and maintaining air conditioning and refrigeration equipment; however, the position of secretary/shipping clerk was not described.

The director denied the petition because the petitioner's limited number of employees would require the beneficiary to provide some of the organization's services. The director noted that, although the petitioner claimed to employ six individuals, the W-2 forms for the 2000 calendar year indicated that the petitioner employed only three individuals, and the petitioner's payroll records for the 2001 calendar year indicated that it employed only four individuals.

On appeal, counsel states:

The beneficiary was denied the Petition for Immigration [sic] Worker because the INS concluded that since there are only three employees in the company, the beneficiary will be doing other functions that are not managerial or executive, and that it would indicate that the beneficiary is not acting primarily as a manager or executive. This is a mistake because the evidence presented indicates that the beneficiary will mostly be engaged in managerial and executive functions. Additionally, there are six employees currently at the company and the INS is using figures from 2001. There will be no other person doing the managerial function, so the beneficiary is clearly the primary executive. The company also plans to have independent contractors doing the functions that the six employees cannot do so the beneficiary will not do them. Finally, the beneficiary will also hire and train new employees as needed, as stated in the evidence. If the beneficiary ever does other non-managerial or executive functions it will be only in [sic] an emergency basis. He will remain primarily a manager executive.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, the duties of the proffered position must be the critical factor. See Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

The petitioner's description of the proffered position establishes that the beneficiary would not be working in an executive or managerial capacity. The petitioner indicates that 70 percent of the beneficiary's time would be devoted to negotiating prices,

marketing, negotiating contracts, managing inventory, and purchasing supplies. None of these activities is a high level responsibility of an executive or manager. 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 states on appeal that the director's conclusion failed to consider that the petitioner currently employs six individuals. Counsel notes that the director considered the petitioner's staffing levels in the year 2001, not its current staffing levels.

Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Therefore, the petitioner must provide information about its organizational structure and staffing levels as they exist as of the filing date of the petition. Here, the petition was filed on February 7, 2001; therefore, the director appropriately considered the petitioner's staffing levels in the 2000 and 2001 calendar years. A review of the record reveals that the petitioner provided inconsistent information regarding the number of employees and their position titles. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

At the time of filing the petition, the petitioner claimed to employ six individuals; however, its organizational chart only listed three employees - the administrative manager, the secretary, and the shipment clerk. In response to the director's request for evidence, the petitioner claimed to employ four individuals - the vice president/administrative manager, the project manager, the air conditioning mechanic, and the secretary/shipping clerk.

The petitioner did not explain the change that allegedly occurred in its staffing levels from the time it filed the petition until the time it responded to the director's request for evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot materially change its organizational structure and staffing levels in an attempt to conform to Bureau requirements.

According to evidence in the record, in the 2000 calendar year and at the time of filing the petition, the petitioner employed only three individuals, two of whom were each paid a \$3,900 yearly wage. The petitioner did not explain either at the time of

filing the petition or on appeal, why it claims to employ six persons. 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, id.* Absent a clear organizational chart that relates to the petitioner's organizational structure at the time of filing the petition, and that lists the names and positions of all employees and their accompanying job descriptions, the petitioner has not established that the beneficiary would serve as more than a first-line supervisor as required by the regulations. See *Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991). Accordingly, the petitioner has not established that the proffered position is in an executive or managerial capacity. The director's decision, therefore, shall not be disturbed.

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 met its burden.

ORDER: The appeal is dismissed. The petition is denied.