

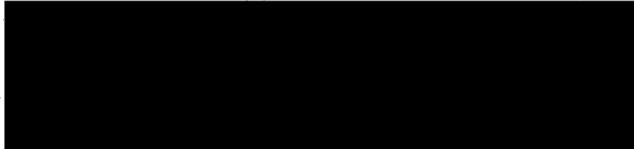
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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

PUBLIC COPY

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



APR 01 2003

File: WAC 02 065 51640

Office: CALIFORNIA SERVICE CENTER

Date:

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)

ON BEHALF OF PETITIONER:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

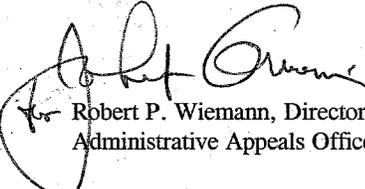
INSTRUCTIONS:

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 employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation providing international staffing solutions. It seeks to employ the beneficiary as its Tempe, Arizona branch manager. Accordingly, the petitioner endeavors 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 managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director's decision was in error as the beneficiary manages the entire branch office, an annual budget of \$4 million, manages staff, and an essential function. Counsel also asserts that the director erred by ignoring long established policy that prior adjudications on the same facts should be accorded appropriate weight, absent gross error. Counsel cites unpublished decisions in support of this assertion.

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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial duties for the petitioner. The petitioner does not claim that the beneficiary's position is an executive position.

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.

The petitioner initially stated the beneficiary's duties as follows:

[The beneficiary] will manage and direct the branch's marketing, customer development, recruitment, training

and business development operations. [The beneficiary] will also direct the implementation of a bill and pay structure to ensure an increase in gross revenues. She will further liaise with supervising managers and executives regarding the detailed financial forecasts for the Tempe branch office.

The director requested a more detailed description of the beneficiary's duties including the percentage of time she spent on the listed duties. The director also requested a brief description of the job duties for each employee under the beneficiary's supervision. The director further requested a copy of the wage reports submitted to the appropriate State office.

In response, the petitioner stated that the beneficiary spent 40 percent of her time managing "the development and implementation of a detailed marketing program," and "20 percent of her time providing guidance and direction regarding recruitment, training and evaluation of service representative [sic] to a subordinate team," and 15 percent of her time managing and directing service representatives' customer development activities and programs." The petitioner noted that the beneficiary spent 12 percent of her time managing and directing the financial operations for the branch office and overseeing the implementation of the bill/pay structure, as well as managing and directing the preparation of financial forecasting. The petitioner indicated that the beneficiary spent 10 percent of her time managing and directing the implementation of service standards, quality performance programs, and corporate collection policies and procedures. The petitioner indicated the beneficiary spent the remaining 3 percent of her time on managing the implementation of recruitment activities, training programs, and employee placement programs.

The petitioner also included a description of the duties of the staffing specialist position, the position(s) subordinate to the beneficiary's position of branch manager. The staffing specialist's duties involved customer service (40%), sales (25%), sourcing (25%), and financial (10%). The petitioner stated that the beneficiary supervised two staffing specialists. The petitioner further provided its quarterly reports submitted to the State identifying its employees and the number of weeks the employees worked. The report for the pertinent time period, the quarter ending December 31, 2001, confirmed the beneficiary's employment, the employment of a second individual for the entire quarter, and the employment of a third individual for three weeks of the pertinent quarter.

The director determined that because the branch office only had one to two employees, in addition to the beneficiary, the beneficiary would necessarily be required to assist in the performance of operational tasks. The director determined that the beneficiary was in essence a first-line manager over non-professional, non-managerial employees. The director also

determined that the petitioner had not established that the beneficiary was a functional manager as it appeared the beneficiary would be involved in routine operational activities rather than the management of a function.

On appeal, counsel for the petitioner asserts that the director erred by not reviewing the record relating to the previously approved L-1 petitions for this beneficiary and finding that either the previous approvals involved gross error or that the beneficiary's position had changed and no longer qualified as a managerial or executive position. Counsel cites an unpublished decision in support of this assertion. Counsel further asserts that the beneficiary manages the entire branch office, is responsible for an annual budget of \$4 million, manages a staff, and manages an essential function.

Counsel's assertions are not persuasive. As established in numerous decisions, the Bureau 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 Enqq. 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 director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions and the record of proceeding does not contain copies of the visa petitions and supporting documents that are claimed to have been previously approved. However, if the previous nonimmigrant petitions were approved based on the same information contained in this petition, the approval would constitute clear and gross error on the part of the Bureau.

In addition, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the AAO. The AAO is not bound to follow the rulings of service centers that are contradictory. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Counsel's citation to unpublished decisions in support of the assertion that the AAO must follow a service center's first decision is also not persuasive. Unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c).

Counsel's assertion that the beneficiary is performing primarily managerial tasks is also not persuasive. In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In this instance, although the petitioner uses statutory language to indicate that the

beneficiary "directs" and "manages" various tasks, the beneficiary and other employee's actual job descriptions do not support this inference. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner's job description indicates that the beneficiary spends 40 percent of her time on marketing duties. There is no clear delineation of this duty for the petitioner's staffing specialists. Likewise, the beneficiary is responsible for the financial operations of the branch office. The Bureau must conclude that it is the beneficiary who is responsible for performing these necessary tasks 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).

In addition, the beneficiary spends 20 percent of her time providing guidance and direction regarding recruitment, training and evaluation of service representatives. These duties are more akin to the supervisory duties of a first-line supervisor rather than a manager as defined by the Act. The record reflects that the beneficiary supervised one, or perhaps two, individuals at the time the petition was filed. The record does not support a conclusion that either of these individuals holds professional, supervisory, or managerial positions. 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. See section 101(a)(44)(A)(iv) of the Act.

Counsel's assertion that the beneficiary manages an essential function of the petitioner is not persuasive. 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). Moreover, as stated above, the beneficiary is performing the essential operating tasks of the petitioner rather than primarily managing these tasks. See *Matter of Church Scientology International, supra*.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial position as defined by the Act or that the beneficiary's duties will be primarily managerial in nature. The description of the beneficiary's job duties indicates that a majority of the beneficiary's duties relate to the performance of basic operational tasks for the petitioner. Further, the record does not sufficiently 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 Bureau 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 or will be employed in either a primarily managerial or executive capacity.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.