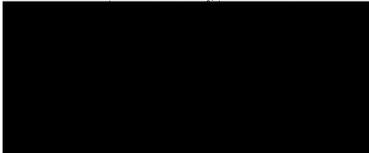


BH

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



File: WAC 01 259 60701 Office: CALIFORNIA SERVICE CENTER

Date:

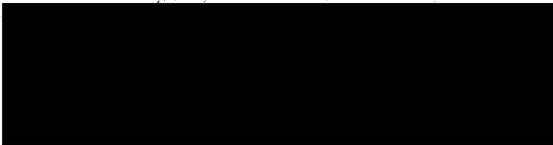
APR 01 2003

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:



PUBLIC COPY

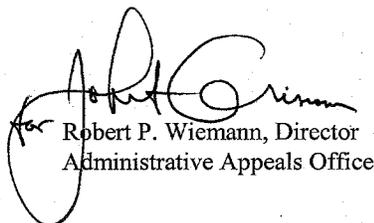
INSTRUCTIONS:

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.


for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California 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 California corporation that seeks to employ the beneficiary as its vice president of business development. 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 neither executive nor managerial.

On appeal, counsel submits a brief and additional evidence. Counsel states that the beneficiary will be employed in a managerial capacity, not an executive capacity.

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 describes itself as a subsidiary of ASE Test Limited (ASE Test) of Taiwan. According to the petitioner, both it and the overseas entity are within the ASE Inc. corporate group (ISE group). The petitioner states that it provides a "one-stop service" in the areas of electrical and environmental screening of semiconductor devices and that it employs approximately 500 persons in the State of California. The petitioner currently employs the beneficiary in L-1A nonimmigrant status in the proffered position, and it is offering the beneficiary the same position on a permanent basis at a salary of \$55,000 per year.

The issue to be discussed is whether the proffered position is in a managerial capacity. The petitioner does not seek classification of the beneficiary as a multinational executive.

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 describes the proffered position as follows:

[The beneficiary] is responsible for managing business development for [the petitioner]. He manages and supervises the sales and marketing of semiconductor testing services, including wafer sorting and final testing. He coordinates the worldwide semiconductor test business for . . . [the petitioner's] related companies He conducts customer visits and business negotiations, and he also manages [the petitioner's] worldwide test capacity allocation. Finally, as Vice President of Business Development, [the beneficiary] is responsible for business strategy and pricing planning.

As Vice President of Business Development, [the beneficiary] manages the business development and customer service departments and has full responsibility for the direction and supervision of a group of 15 professional employees reporting directly to him. These professional employees include a Senior Customer Service Manager, customer service representatives, sales managers, sales engineers and sales and marketing representatives. [The beneficiary] has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) with respect to the personnel he supervises.

[The beneficiary's] supervisory duties include the supervision of customers' inquiries, pricing strategy and negotiation, quotes preparation, sales activities, customer visits and market analysis. Further, he exercises direction over the day-to-day operations of the business development and customer service departments. [The beneficiary] reports directly to the President of the company. In sum, [the beneficiary] is responsible for setting and implementing the short-range and long-range goals concerning business development, including maintaining customers relationships with existing customers and exploring new business opportunities.

In the initial petition filing, the petitioner did not clearly identify its staffing levels. Although the petitioner stated on the I-140 petition that the ASE corporate group employed 589 individuals worldwide, it did not specifically state the number of employees within its operations, or mention the names, titles or job descriptions of the 15 employees who would work in positions subordinate to the beneficiary. On December 28, 2001, the director requested additional evidence. In particular, the director requested a more detailed description of the proffered position to

include the percentage of time that the beneficiary would spend in each of the listed duties, an organizational chart that described the petitioner's managerial hierarchy and staffing levels, and copies of Form DE-6, Quarterly Wage Report, for the last four quarters.

Counsel responded to the director's request for evidence. Regarding a more detailed description of the proffered position, counsel submitted a second copy of the petitioner's original letter in support of the petition. Counsel stated that this letter contained the details of the beneficiary's job responsibilities. Regarding its staffing levels, the petitioner submitted copies of relevant portions of its Form DE-6 and an organizational chart. The organizational chart indicated that the beneficiary would supervise one senior customer service manager, and an undisclosed number of customer service representatives, sales managers, sales engineers, and sales and marketing representatives.

The director denied the petition because the petitioner's evidence did not establish that the beneficiary would function in a managerial capacity. The director noted that copies of the DE-6 forms showed that the petitioner paid wages to only seven employees even though the petitioner claimed that the beneficiary would supervise 15 employees. The director also noted that the petitioner did not include in the organizational chart the names, educational levels, annual salaries/wages or job descriptions of the employees supervised by the beneficiary. The director concluded that there was insufficient evidence that the beneficiary would function as more than just a first-line supervisor.

On appeal, counsel states that the beneficiary manages a function of the petitioner, which is the company's business development. Counsel also claims that the beneficiary has full responsibility for the direction and supervision of 15 employees. Counsel acknowledges that the director requested an organizational chart that contained the names, educational levels, annual salaries/wages and job descriptions of the employees under the beneficiary's supervision. Counsel states, however, that the petitioner did not supply this information because it was listed under the sub-category of "Qualifying Relationship" and the requested information was not needed to determine whether the petitioner and the overseas entity had a qualifying relationship. The petitioner submits the previously requested information on appeal.

Additionally, counsel states that the director misinterpreted the petitioner's evidence regarding the DE-6 forms. According to counsel, the petitioner employs 500 individuals and, therefore, it would have been burdensome to submit the DE-6 forms for its entire staff. Counsel states that the petitioner only submitted copies

of the DE-6 form page on which the beneficiary's name appeared. Counsel maintains that because the petitioner employs approximately 500 individuals, it is "feasible that the beneficiary supervises 15 employees." Counsel further states that the beneficiary now supervises 30 employees instead of the original 15 employees. Finally, counsel states that the beneficiary maintains the authority to hire and fire personnel and exercises discretion over the day-to-day operations of the business development and customer service departments.

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). The purpose of the request for evidence (RFE) is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. As previously stated, this evidence consisted of an organizational chart that showed the petitioner's managerial hierarchy and staffing levels, and which contained the names, educational levels, annual salaries/wages and job descriptions of the employees supervised by the beneficiary. Counsel claims that the petitioner did not submit the requested evidence because it was listed under the sub-category of "Qualifying Relationship," an issue to which the requested evidence did not pertain. Although counsel is correct in noting that the information was listed in the RFE in that sub-category, the petitioner was, nevertheless, required to submit all of the evidence regardless of how it was arranged or listed in the RFE. Therefore, the Administrative Appeals Office will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The petitioner submitted only one job description for the proffered position despite the director's request for additional information regarding the percentage of time that the beneficiary would devote to each duty. Although the beneficiary's job description is lengthy, it does not contain the level of detail necessary to establish that the beneficiary would primarily execute managerial duties.

The beneficiary's job description indicates that the beneficiary would manage and oversee certain functions and duties; however, it also indicates that the beneficiary would perform certain sales and marketing activities. For example, one duty of the beneficiary would be to set and implement short-range and long-range goals, while another duty would be to conduct customer visits and business negotiations. The petitioner's description of the proffered position contains both managerial elements, such as

setting goals, as well as sales and marketing duties, such as visiting customers and negotiating contracts. The petitioner fails to quantify the amount of time that the beneficiary would spend on the alleged managerial duties versus the amount of time he would spend on sales and marketing duties. This failure of documentation is important because not all of the beneficiary's responsibilities fall directly under traditional managerial duties. *IKEA US, Inc., v. U.S. Dept. of Justice I.N.S.*, 48 F.Supp. 2d 22 (D.D.C. 1999), *aff'd*, 1999 WL 825420 (D.C. Cir. 1999). Without more specific information regarding how and at what frequency the stated duties are performed, the petitioner's job description of the proffered position merely reiterates the definition of managerial capacity; it does not establish that the position offered to the beneficiary involves primarily managerial duties. *Fedin Bros. Co., Ltd. v. Sava*, 724 F.Supp. 1103, (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990).

Additionally, evidence regarding the petitioner's staffing levels fails to establish that the beneficiary would direct and control the work of supervisory, managerial or professional employees. The director stated in the denial letter that, based upon a review of the DE-6 forms, the petitioner employed only seven individuals. A further review of the evidence of record, however, indicates that the petitioner actually employs approximately 500 individuals. Although counsel persuasively states that the petitioner employs a large staff, she is unpersuasive in claiming that, based upon the size of the petitioner's operations, it is feasible that the beneficiary would supervise 15 individuals.

The petitioner bears the burden of establishing 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). Therefore, the petitioner must not only specify the number of individuals that the beneficiary would supervise, but it must also provide the names, titles, and job responsibilities of these individuals. The beneficiary shall not be considered to be acting in a managerial capacity merely on the basis of the number of employees that he supervises or directs. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C).

The petitioner indicated that the beneficiary would supervise one senior customer service manager and an undisclosed number of customer service representatives, sales managers, sales engineers, and sales and marketing representatives. The petitioner did not provide the names of these individuals or their job descriptions. Absent a listing of the names and specific duties of persons supervised by the beneficiary, the petitioner has not shown that the beneficiary would direct and control the work of supervisory, managerial or professional employees.

The Bureau notes that counsel states on appeal that the beneficiary now supervises 30 individuals instead of the 15

employees initially indicated in the I-140 petition filing. The Bureau, however, cannot consider any facts that come into being subsequent to the filing of a petition. See *Matter of Michelin Tire* 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that the beneficiary would be working in a managerial capacity on the basis of his supervision of 15 employees.

Counsel states on appeal that the beneficiary manages a function, which is the petitioner's business development. Neither counsel nor the petitioner, however, explains how business development, which is broad in its scope, is essential to the petitioner's operations. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Based upon evidence before the Administrative Appeals Office at the present time, the proffered position is not in a managerial capacity because the evidence fails to establish that the beneficiary would manage an essential function or manage a department, subdivision or component of its operations. Accordingly, the director's decision will 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 that burden.

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

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