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

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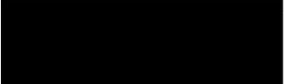
ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC 01 296 51682 Office: CALIFORNIA SERVICE CENTER

Date: APR 08 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.

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 director's decision shall be withdrawn and the matter remanded to the director for entry of a new decision.

The petitioner is a California corporation that seeks to employ the beneficiary as its vice president, North American sales.<sup>1</sup> 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 submits a brief and the petitioner submits a statement.

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

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<sup>1</sup>Subsequent to filing the petition, the petitioner changed the position that it would be offering to the beneficiary. The new position's title is vice president of sales, global partners. This material change to the title and duties of the position being offered to the beneficiary shall be discussed later in the decision.

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 one subsidiary in the corporate group of [REDACTED] is a limited liability corporation duly organized under the laws of France. The petitioner states that it is engaged in the development of network security identification technology services and products, and employs 114 persons. According to the petitioner, it currently employs the beneficiary in L-1A nonimmigrant status and it is offering the beneficiary a permanent position at an annual salary of \$270,000 per year.

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.

At the time of filing the I-140 petition on September 26, 2001, the petitioner stated that it was offering the beneficiary the position of vice president, North American sales, and it described the proposed duties of the position as follows:

[The beneficiary] will have complete responsibility for directing all North American sales, as well as worldwide channel sales organizations, and will be called upon to provide leadership to and build a world-class sales organization in the digital identity and electronic certification/verification industry. All aspects of sales management are within the scope of the Vice President including developing sales objectives, strategies and plans to attain corporate goals. Reporting to the Senior VP of World-Wide Sales and Marketing, [the beneficiary] will operate within senior levels of ██████████ management in defining and implementing sales execution plans. He will penetrate assigned markets to capture ██████████ market share and will manage all sales activities towards exceeding the sales revenue goals.

As Vice President, [the beneficiary] will manage and direct the daily operations of our North American sales operation. He will supervise, manage and control a team comprised of direct sales, channel distribution, system engineers, inside sales and sales administration, including professional level employees and other staff members. He will be responsible for their productivity and managing their day-to-day work activities. [The beneficiary] will have the authority to hire and fire these employees and make such personnel decisions as recommending raises, advancements and work/vacation schedules.

The petitioner also submitted two organizational charts with the I-140 petition filing. One chart pertained to the beneficiary's position with the overseas entity. The second chart, which related to the petitioner's organizational structure, showed the beneficiary, as vice president, North American sales, under the direct supervision of the petitioner's chairman, president and chief executive officer (CEO). The chart also showed that the beneficiary would have supervisory authority over one inside sales manager, an undisclosed number of regional sales managers, one director of technical support, and one vice president of world wide (WW) channel sales. The petitioner only provided the name of the vice president of WW channel sales; it did not provide the names of the individuals who occupied the other positions. The petitioner also did not provide job descriptions for any of these employees.

On February 1, 2002, the director requested additional evidence from the petitioner. In particular, the director requested a more detailed description of the proffered position and an organizational chart that listed the names, job titles and job duties of the individuals who would be employed in positions subordinate to the beneficiary. The director also requested copies of the petitioner's Form DE-6, Quarterly Wage Report, for all quarters in the 2001 calendar year.

The petitioner responded to the director's request for evidence. In the requested organizational chart, the beneficiary's title was no longer vice president, North American sales; his title became vice president of sales, global partners. The chart indicated that the beneficiary would supervise one manager of global marketing; however, the petitioner did not provide an accompanying job description for this position. The petitioner also submitted a job description for the position of vice president, North American sales, which was the position initially offered to the beneficiary at the time the petition was filed. The petitioner's job description of vice president, North American sales, was as follows:

Direct North American sales. Responsibilities included (percent of time spent):

- Define sales objectives, strategies and plans to attain corporate goals (15%)
- Manage and direct daily sales operation (30%)
- Recruit, Supervise, direct and manage team comprising (30%):
  - Direct Sales
    - Channel Distribution
    - Sales Engineers
    - Inside Sales
- Manage and liaise with key customers and partners (20%)
- Contributed [sic] with senior management towards the strategic development of the company (5%)

The petitioner also provided a list of employees supervised by the vice president, North American sales, which included each individual's name, title, duties, education, base salary, commission and target salary. This list included 14 individuals with titles such as sales director north west, sales director south west, sales director north east, sales director south east, sales engineer manager, sales engineer, inside sales manager, and inside sales. The director noted on this list that the names of only five of these 14 employees were listed on the DE-6 forms that the petitioner submitted.

The director denied the petition On May 28, 2002, finding that the proffered position was not in an executive or managerial capacity. The director acknowledged that the beneficiary's title had changed from vice president, North American sales, to vice president of sales, global partners. The director noted that, in this new position, the beneficiary supervised only one employee. The director concluded that the beneficiary's new job was merely a general managerial position.

On appeal, counsel states that the beneficiary is qualified for classification as a multinational executive or manager based upon the duties of the vice president of sales, global partners position. Counsel's brief relates to the duties associated with the beneficiary's new position and, regarding the position of vice president, North American sales, counsel states that: "Although [the beneficiary's] previous position involved managerial and executive duties, it is even clearer that his current position encompasses all of the qualifications for 'executive capacity'." In addition, the petitioner submits a letter to explain why the position of vice president of sales, global partners, is in an executive or managerial capacity.

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). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is in an executive or managerial capacity. 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); *Matter of Bardouille*, 18 I & N Dec. 114 (BIA 1981).

A review of the record reveals that the director requested additional evidence because the beneficiary's eligibility as a multinational executive or manager had not been established at the time the petition was filed. The petitioner's response to the director's request showed that the petitioner's organizational hierarchy had changed and that the petitioner was seeking approval to employ the beneficiary as the vice president of sales, global products, not the vice president, North American sales.

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 offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the I-140 petition was filed merits classification as a multinational executive or managerial position. *Matter of Michelin Tire, supra*; *Matter of Katigbak, supra*; *Matter of Bardouille, supra*. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The petitioner submitted evidence in response to the request for evidence, which indicated that it was offering to the beneficiary a new position. The petitioner also submitted a job description for the position of vice president, North American sales, which was the position initially offered to the beneficiary.

The director had information in the record that revealed the beneficiary was no longer employed in the position of vice president, North American sales. Although the petitioner was no longer offering this position to the beneficiary, the director did have two separate job descriptions of this position and could have used this evidence to determine whether the position was in an executive or managerial capacity. Instead, however, the denial letter erroneously focused on the beneficiary's new position and how the new position did not qualify as a managerial or executive position. The director did not adequately discuss the pertinent issue of the beneficiary's eligibility at the time the petition was filed, nor did she explain to the petitioner the deficiencies

of the record on this issue. The director's error resulted in evidence being submitted on appeal that relates to whether the beneficiary's new position (vice president of sales, global products) is in an executive or managerial capacity.

As the director improperly based her decision on the beneficiary's new position, this matter shall be remanded for the purpose of a new decision on the issue of the beneficiary's eligibility at the time the petition was filed.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the beneficiary's eligibility at the time the petition was filed, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision of May 22, 2002 is withdrawn. The matter is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

DEC 12 2002