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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 00 011 52487 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)

IN 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 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1996 in the State of California and is claimed to be an affiliate [REDACTED] located in the Ukraine. The petitioner is engaged in the wholesale computer component business. It seeks to employ the beneficiary as its president. 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 and will be employed in a managerial or executive capacity.

On appeal, counsel submits a brief refuting the director's adverse findings.

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 which 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 beneficiary has been and will be performing managerial or executive duties.

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.

In the initial filing, the petitioner described the beneficiary's prospective duties in the United States as follows:

As President of [REDACTED] [the beneficiary] is responsible for directing and managing all activities of the company. He has complete control over establishing the most advantageous courses of action for the successful direction of the company. [The beneficiary's] duties include: formulating and administering policies and objections for the company's new business ventures; developing organizational policies; establishing business procedures and guidelines; establishing budget and conducting financial market planning; reviewing financial statements to determine status in attaining objectives; reviewing analyses of activities, costs, operations, etc., to determine progress toward goals; maximize returns on investments and increase productivity; and setting up departments, hiring new staff, etc.; and seeing to various needs of the company so that it thrives and prospers. Additionally, he is responsible for verifying the accuracy of the books, establishing or updating existing purchasing agreements, negotiating prices, and developing and expanding the company's business activities. . . .

On September 5, 2000 the director instructed the petitioner to submit further evidence to establish that the beneficiary had acted, and would act, in an executive or managerial capacity. Namely, the petitioner was asked to submit a more detailed description of the beneficiary's duties in the United States, indicating the percentage of time spent performing each duty.

In response to the above request, the petitioner submitted the same list of duties originally submitted in support of the petition.

The director subsequently denied the petition, concluding that the petitioner had failed to establish that the beneficiary has been and will be performing primarily managerial or executive duties.

The petitioner has now submitted an appeal supported by an appellate brief from counsel. In the brief, counsel provides a supplemental list of the beneficiary's duties, claiming that they are of an executive nature. However, it is noted that failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant case, the petitioner failed to provide a more detailed description of duties and the percentage of

time spent performing each duty, as instructed in the Bureau's request for additional evidence.

It is further noted that where, as in this instance, a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Bureau will not consider evidence submitted on appeal for any purpose. Rather, the Bureau will adjudicate the appeal based on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. Accordingly, counsel's supplemental description of the beneficiary's duties will not be considered in this proceeding.

Other than the description of duties, counsel maintains that the beneficiary has been and continues to be "the only person within the corporation capable of taking on the day-to-day responsibility for directing and managing the activities" of the petitioning organization. The beneficiary's discretionary authority over personnel and over the petitioner's overall daily activity is not disputed. Discretionary authority is, moreover, only one aspect of the definitions of manager and executive. A beneficiary can maintain all of the discretionary authority over every aspect of a business, yet still be performing, rather than managing or directing the management of the daily, non-qualifying tasks. For this reason, it is crucial for the petitioner to establish that the beneficiary's daily duties are primarily managerial or executive. 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 the instant case, the descriptions of the beneficiary's position, as provided with the initial filing and in response to the Bureau's request for additional evidence, consisted merely of general lists of responsibilities which were too vague to determine, in the context of the petitioner's business, what the beneficiary actually does on a daily basis. Thus, the petitioner has failed to establish that the beneficiary's daily tasks are primarily managerial or executive.

On appeal, counsel describes the physical and financial growth the petitioner has experienced since commencing business in 1996 and claims that such growth can, in large part, be attributed to the beneficiary's knowledge and leadership abilities. While this point is undisputed, the fact that the beneficiary is a tremendous asset to the petitioning company does not establish the managerial or executive nature of his daily tasks. 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).

On review, the record lacks sufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the record indicates that the petitioning enterprise does not maintain a qualifying relationship with the claimed parent company. In order to qualify for this immigrant visa category, the beneficiary must be an executive or manager who has previously worked for a foreign firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and is coming to the United States to work for the same entity, or its affiliate or subsidiary. See 8 C.F.R. § 204.5(j)(2). In the present case, the petitioner submits evidence which indicates that the beneficiary owns 95 percent of the foreign entity and that he owns 100 percent of the U.S. entity. Accordingly, there is no parent entity with ownership and control of both companies which would qualify the two as affiliates. Nor does the foreign company maintain ownership and control over the petitioning entity, which would qualify the petitioner as a subsidiary of the foreign company. However, as the appeal will be dismissed on grounds discussed above, this issue need not be further addressed.

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 sustained that burden.

ORDER: The appeal is dismissed.