

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

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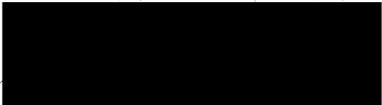
ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: WAC 01 215 53259 Office: CALIFORNIA SERVICE CENTER

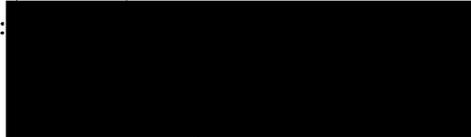
Date: APR 08 2003

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

The petitioner was incorporated in 1994 in the State of California and is claimed to be the parent company of [REDACTED] located in Germany. The petitioner is engaged in the toy manufacturing business. It seeks to employ the beneficiary as the international sales 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 has been and will be employed in a managerial or executive capacity.

On appeal, counsel submits a brief asserting that the director's decision is erroneous. Additional evidence is submitted.

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 past duties with the foreign entity as follows:

[The beneficiary] is responsible for the marketing, sales and operations requirements of [REDACTED] for the European market. [He] oversees and coordinates the sales and marketing activities with the head of the U.S. office and European dealers and distributors. He prepares marketing forecasts and assists in preparing the annual European business plan. [He] monitors the revenue and profit goals to ensure these goals are met or exceeded. [He] also oversees the European Sales Operations, Customer Service, dealer/distributor support and warehousing activities. As a result of his efforts, [the beneficiary] has successfully generated new accounts in different countries. [He] is charged with coordinating and increasing the number of European distribution accounts and direct [REDACTED] dealers in Germany and Austria, along with researching and qualifying new partner opportunities throughout Europe. [The beneficiary] exercises a wide-latitude of discretionary managerial authority in the strategic and tactical planning for our European sales and marketing. . . .

The beneficiary's proposed duties are described as follows:

[The beneficiary] will manage our international sales, warehouses and distribution. More specifically, he will manage the European/ROW (rest of world) distributors and will identify and open select ROW markets. [The beneficiary] will monitor and track distributor sales and product demand and update quarterly forecasts accordingly. He will ensure that European/ROW Sales Support and Marketing efforts meet sales and profit goals. [He] will provide forecasts for our marketing needs and request the production of marketing materials as needed. He will also plan international trade shows to promote our products.

[The beneficiary] will transfer the knowledge he has acquired since joining our subsidiary . . . to our California location. [He] will exercise a wide-latitude of discretionary managerial authority in the strategic and tactical planning for Rokenbok's U.S. and European sales. [He] will function as a manager of the above-mentioned critical functions and components

On October 31, 2001 the director instructed the petitioner to submit organizational charts for the U.S. and foreign subsidiary organizations. The petitioner was asked to identify the beneficiary's position with both the foreign and U.S.

organizations, the positions of his subordinates, as well as supply brief descriptions of their respective duties, educational levels and wages. The petitioner was also asked to provide a more detailed description of the beneficiary's past duties with the foreign entity, and the proposed duties with the U.S. entity.

In response, the petitioner submitted organizational charts for both the U.S. and foreign entities. The U.S. chart indicates that the beneficiary's position is that of an international sales manager who manages the European office. His subordinates include a customer service employee and a senior accountant, whose position is described as administrative. Although a field sales representative position is also listed as the beneficiary's subordinate, that position is not yet filled according to the organizational chart.

The petitioner provided the Bureau with the following list of the beneficiary's past and present duties:

Past duties:

- Responsible for marketing, sales and operations requirements of [REDACTED] for the European market
- Oversees and coordinates the sales and marketing activities with the head of the U.S. and the European dealers and distributors
- Prepares marketing forecasts and assists in preparing annual European business plan
- Monitors the revenue and profit goals
- Oversees the European sales operations, customer service, dealer/distributor support and warehousing activities
- Charged with coordinating and increasing European distribution accounts and direct dealer contacts
- Researching and qualifying new partner opportunities throughout Europe
- Exercises a wide latitude of discretionary managerial authority in the strategic and tactical planning form European sales and marketing
- Function as manager of critical functions and components of operations
- Posses [sic] significant independent responsibility and authority to ensure successful completion to influence strategic development and growth throughout Europe.

Proposed duties:

- Manage international sales, warehouse and distribution
- More specific
- Manage European/ROW distributors
- Research, identify and open ROW markets
- Monitor and track distributor sales and product demand
- Update quarterly forecasts
- Ensure European/ROW sales support and marketing efforts
- Meet sales and profit goals set
- Provide forecast for marketing needs
- Request and oversees marketing materials production for specific markets
- Plan and coordinate international trade shows and promote the product.
- Exercises a wide latitude of discretionary managerial authority in the strategic and tactical planning for European and ROW sales and marketing
- Has significant independent responsibility and authority to ensure successful completion to influence strategic development and growth through Europe and ROW markets.
- Will be responsible for overseeing a crucial and essential function of the company
- Time spent on specific duties

Research and contact new contacts	25%
Maintain and contact existing contacts	20%
Travel	35%
Trade shows/Marketing materials	5%
Forecast	5%
Warehouse/Distribution coordination	10%

On January 16, 2002 the Bureau issued another request for additional evidence, instructing the petitioner to submit a variety of documents to determine that it has a qualifying relationship with the claimed foreign entity. The petitioner responded by providing the requested documentation.

On April 2, 2002 the director denied the petition concluding that the petitioner had not submitted sufficient evidence to establish that the beneficiary has been and would be performing duties that are primarily managerial or executive.

On appeal, counsel submits a brief asserting, in part, that the director failed to acknowledge receipt of the petitioner's response to the initial request for additional evidence when issuing the second request for additional. However, counsel has cited no legal precedent or statute requiring the Bureau to provide the petitioner with such notification. The record indicates that the director's initial request addressed the issue of qualifying employment, while the second request addressed the issue of a qualifying relationship. The director did not violate any statute or regulation by addressing the two issues with two separate requests for evidence.

Counsel further asserts that the director violated the petitioner's due process rights by not notifying the petitioner in the second request for additional evidence of her concerns regarding the petitioner's response to the initial request for evidence. Again, counsel cited no statute, regulation, or legal precedent to support this claim. Moreover, counsel failed to appeal or submit a motion to reopen or reconsider the director's findings.

In addition, counsel asserts that the director erred in concluding that the petitioner failed to submit a brief description of job duties, education level, annual salaries/wages for the beneficiary's subordinates. Counsel claims that the petitioner submitted the requested information in its prior responses to the director's request for additional evidence. In support of that claim, counsel submits the petitioner's prior responses to the director's requests for additional evidence. A thorough review of such documentation indicates that the petitioner did, indeed, provide brief job descriptions for both of the beneficiary's subordinates. However, the petitioner provided the education level for only one of those employees and, other than indicating whether such employees are paid a salary or are compensated on an hourly basis, the petitioner did not provide an actual amount of compensation for either employee. Thus, while the director's finding in regards to this information was only partly correct, she properly concluded that the beneficiary does not supervise professional or managerial employees.

The brief job description for the petitioner's senior accountant indicates that she generates reports reflecting her determination of the company's revenues and projects expenditures; assists in budget preparation of the European office; and coordinates the implementation of accounting control procedures. While this job description indicates that the senior accountant is a professional position, it is a position that will remain in the European office.

The petitioner has offered no explanation or documentary proof of how the beneficiary plans to supervise employees who are physically located thousands of miles away from the beneficiary's primary place of employment. 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). Furthermore, based on the customer order and customer service functions of the beneficiary's other subordinate employee, the Bureau can conclude that this individual is neither professional nor managerial, regardless of where he performs his duties.

Thus, based on the petitioner's organizational chart, there is no evidence that the beneficiary will be supervising any employees at all. This factor does not automatically preclude the beneficiary from qualifying as a manager or executive. The petitioner must, nevertheless, establish that the beneficiary acts as a function manager. Moreover, even though the beneficiary might not personally manage other employees within the U.S. entity, the petitioner must establish that it has other employees who could relieve the beneficiary from performing nonqualifying duties. Counsel asserts that the petitioner has no such burden and claims that 8 C.F.R. § 204.4(j)(2) does not limit "the ability of a functional manager to directly perform the essential function managed." While counsel is correct in stating that the language of the cited regulation does not specifically preclude a function manager from performing the managed function, case law precedent has established that 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). Consequently, without evidence that others perform the function that the beneficiary will purportedly be managing, the petitioner cannot establish that the beneficiary's duties will be primarily managerial or executive.

On review, counsel's arguments are 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, the beneficiary's job description indicates that he is responsible for all duties dealing with international sales. To carry out those responsibilities, the beneficiary will engage in such nonqualifying duties as researching markets, personally monitoring sales and product demand, and planning trade shows where the beneficiary will promote the petitioner's products. The summary of the beneficiary's duties does not include a description of any subordinate positions which would perform the essential functions of the petitioner's business or the beneficiary's duties. The description of the beneficiary's job duties lead the Bureau to

conclude that the beneficiary is performing as a professional or "staff officer," but not as a manager or executive.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. Further, the record is not persuasive in demonstrating that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. 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 Bureau 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.

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.