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

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

PUBLIC COPY



APR 08 2003

File: WAC 01 232 59387 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: [Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

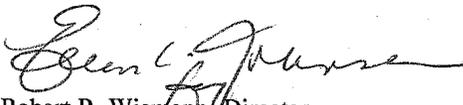
INSTRUCTIONS:

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 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 1993 in the State of California and is claimed to be a wholly-owned subsidiary of [REDACTED] which is owned by [REDACTED] the parent company, located in Germany. The petitioner is engaged in the publishing business. It seeks to employ the beneficiary as its president and marketing director. 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 states that the director erred in its findings and submits a brief in support of his statement.

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 and present duties as follows:

In addition to an assistant in Germany, [the beneficiary] supervised the work of five independent representative organizations in the U.S.[:] J.E. Eisenberg Media in Los Angeles, Starmark, The Croydon Group, and SEM Manufacturing Engineering. Each of these organizations had sales people assigned to our projects, and [REDACTED] dealt with their managers.

In this position [REDACTED] had full discretionary authority to manage the complex function of market development for highly specialized and technical advertising by U.S. companies in foreign trade publications.

In April 1994 [REDACTED] was transferred to [REDACTED] the U.S. subsidiary, to manage the same function from the U.S. In this position he supervises three other [REDACTED] employees, an independent sales organization in Detroit, and an independent accountant. He has full discretionary authority for the U.S. market which now produces revenues of \$2,500,000, functioning independently subject only to general oversight from the parent company.

On November 13, 2001 the director instructed the petitioner to submit further evidence to establish that the beneficiary had been and would be employed in an executive or managerial capacity.

In response, counsel stated that the beneficiary managed an essential function of the petitioning organization, and supervised managerial personnel of "independent sales organizations." In a separate statement from the petitioner, the beneficiary's duties are listed as follows:

- development of [the petitioner's] marketing strategies in North America-15%
- development of partnerships and mergers with U.S. publishers-10%
- management of U.S. sales staff and independent representative-30%
- director contact with major advertisers-35%
- monthly reports to headquarters in Germany-15%

The petitioner also submitted its organizational chart which indicates that the beneficiary's subordinates include a salaried sales person, an advertising sales person paid on an hourly basis, an automotive advertising sales person paid on a commission basis, and an "outside staff" accountant paid on an hourly basis. Contrary to the petitioner's organizational chart, which indicates that the beneficiary supervises four individuals, its W-2 wage and tax statements for the year 2000 were submitted for only three employees: the beneficiary and the petitioner's two advertising sales people.

The director noted this discrepancy in her denial and questioned the petitioner's failure to acknowledge and address it. On appeal, counsel attempts to clarify this discrepancy by stating that the petitioner has always maintained that the beneficiary supervised two employees, an independent sales organization and an independent accountant and that the independent contractors do not appear on the petitioner's payroll tax report. However, there is no evidence in the record which supports the petitioner's claim to having outside contractors. 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, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, such evidence has not been submitted. 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).

The director also noted that the petitioner failed to provide the Bureau with requested brief descriptions of the job duties of the beneficiary's subordinates, their educational levels and their annual salaries. The AAO acknowledges that the petitioner did provide salaries of two of the beneficiary's subordinates by virtue of having submitted their year 2000 W-2 wage and tax statements. However, in regard to the outside contractors, also claimed to be the beneficiary's subordinates, only hourly rates were provided without any indication as to how many hours per week, per month, or per year any of the alleged contract employees worked.

Furthermore, section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a

United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Thus, according to these definitions merely having a baccalaureate degree is not enough to be considered a professional if that degree is not actually required by the position being filled. In the instant case, the petitioner failed to demonstrate that the subordinate positions required a college degree, making it impossible to conclude that the beneficiary's subordinates fit under the statutory or regulatory definitions of the term "professional."

The director also concluded that "the beneficiary cannot be deemed a 'functional' manager" because the petitioner has not established that the beneficiary manages, and refrains from performing, the petitioner's essential function. In response to the director's conclusion, counsel asserts that "[t]his argument goes too far, since it would establish that there can be no such thing as a manager or executive of a function." Although counsel further states that "[t]his is contrary to regulations," the only documentary evidence he introduces in support of his argument consists of quotes from non-precedent decisions of the Associate Commissioner. However, while 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, counsel's argument is contradicted by precedent case law which states 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).

Although the petitioner has established that the beneficiary is at the top of the petitioner's hierarchy, this status does not automatically mean that the beneficiary refrains from performing the function he manages. In fact, the list of duties provided in response to the Bureau request for additional evidence indicates that the beneficiary develops the petitioner's marketing strategy and personally seeks out business relations with U.S. publishers. Although it is apparent that both of these duties are crucial to the success of the petitioning organization, the fact that the beneficiary performs them both further supports the director's conclusion that the beneficiary's role in the petitioning organization is not limited to merely managing, but rather requires his direct involvement in performing some of the essential functions. 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.

Upon review, the description of the beneficiary's job duties and the evidence of record lead the Bureau to conclude that the beneficiary is performing as a professional or "staff officer," 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 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. For this reason, the petition cannot be approved.

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.