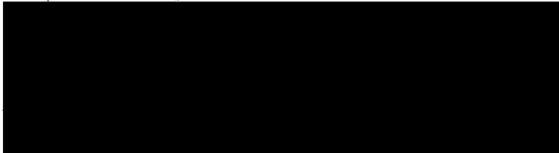


BH

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.  
BCIS, AAO, 20 Mass, 3/F  
Washington, DC 20536



File: WAC 01 280 58831 Office: CALIFORNIA SERVICE CENTER

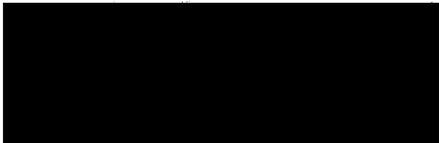
Date: APR 10 2003

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**

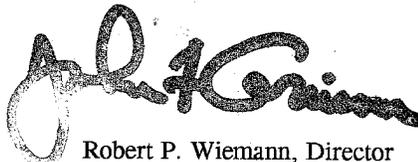
**INSTRUCTIONS:**

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 employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in March 1982. It is engaged in providing specialized services in the areas of system integration, software consulting, strategic information technology planning, system analysis, design program development and implementation, and multi-media and image processing. It seeks to employ the beneficiary as a project leader. 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 would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the petition was wrongfully denied. Counsel asserts that the "beneficiary qualifie[s] for the Managerial position offered, supervising and manag[ing] other profession[al]s and [a] manager."

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 that 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. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial duties for the petitioner. Counsel on appeal makes clear that the beneficiary's position is not an executive position but rather a managerial position.

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 initially stated the beneficiary's duties as follows:

[The beneficiary] is to be responsible for design, development, maintenance and management of complex

custom software modules to meet client specifications. To analyze and determine user requirements for the development of program and database design specifications, and testing of programs to be worked on by lower-level engineers. To provide guidance, technical and business support, and coordinate the activities of lower-level engineers.

The director requested a more detailed description of the beneficiary's duties including the percentage of time spent on the listed duties. The director also requested the petitioner's organizational chart clearly identifying the beneficiary's position on the chart and all the employees under the beneficiary's supervision. The director further requested a copy of the wage reports submitted to the appropriate State office.

In response, the petitioner through its counsel, stated that the beneficiary provided overall direction, supervision, and defined the scope of the project (20 percent), planned and coordinated the activities of the software team (40 percent), and reviewed the work product of the team (20 percent). The beneficiary also engaged in communications with the client (15 percent) and with senior management (5 percent). Counsel indicated that the beneficiary remotely controlled and supervised the work of the software team who were located in India. Counsel declined to submit its California Form DE-6, Employer's Quarterly Wage Reports as the beneficiary's software team was located offshore. The petitioner provided several organizational charts. The first chart depicted the managerial hierarchy of the executive office, the second chart depicted the managerial hierarchy of the office of the president, the third chart depicted the Indian organization, and the fourth chart depicted the "provider systems" department of the United States organization. The chart for the Indian organization did not show the beneficiary's position. The chart for the "provider systems" department showed the beneficiary in the position of project management consultant reporting to the manager of the department and with no employees subordinate to the position. The other charts did not reflect the beneficiary's position and did not reflect the position of the beneficiary's supervisor.

The director determined that the petitioner had not established that the beneficiary would perform duties in an executive capacity. The director also determined that the evidence only demonstrated that the beneficiary would be a first-line supervisor over non-managerial and non-professional employees. The director further determined that the petitioner had not demonstrated that the beneficiary managed an essential function of the petitioner, but rather, demonstrated only that the beneficiary would be performing the function. The director concluded that the beneficiary also would not qualify as performing duties in a managerial capacity.

On appeal, counsel emphasizes that section 101(a)(44)(A)(ii) provides that a beneficiary may manage a function. Counsel also states that the employees under the beneficiary's supervision are programmers, programmer analysts, system analysts, and a manager, and thus, the beneficiary is a professional. Counsel further asserts that "nothing in the regulations [states] 'substantially all of the employee's duties must be at a managerial or executive level for a manager such as [the beneficiary] to supervise' as discussed in the director's denial." Counsel concludes that the beneficiary is well qualified for the position and manages and supervises other professionals and managers.

Counsel's assertions 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 petitioner has submitted a broad position description. It cannot be determined from the position description that the beneficiary will be engaged in managerial functions relating to the design, development, maintenance, and management of software modules rather than performing tasks relating to those functions. 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). Moreover, the petitioner has not provided any documentary evidence to support its claim that the beneficiary is engaged primarily in managerial duties. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel, for example, emphasizes that section 101(a)(44)(A)(ii) of the Act allows a beneficiary to engage primarily in the management of an essential function of the petitioner. However, neither counsel nor the petitioner have identified the essential function and then provided documentary evidence of the various tasks relating to the management of the essential function. In addition, counsel asserts that the beneficiary is a professional; however, eligibility for this visa classification does not hinge on the beneficiary's professional status but, rather, on whether the beneficiary will be primarily performing managerial or executive tasks.

Counsel's statement that the employees under the beneficiary's supervision are programmers, programmer and system analysts, and a manager, has no meaning in the context of this visa classification without independent documentation of their

employment, and further without documentary evidence that the beneficiary actually supervises these individuals. First, 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). Second, as noted above, going on the record without documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*. Third, counsel does not attempt to qualify these positions as professional, supervisory or managerial positions.

Counsel's assertion that "nothing in the regulations [states] 'substantially all of the employee's duties must be at a managerial or executive level for a manager such as [the beneficiary] to supervise' as discussed in the director's denial" is not clear. Asserting that the beneficiary's assignment within the organization does not have to be an assignment in which the employee primarily performs the elements set out in the statute ignores the plain meaning of the statute. Alternatively, asserting that a portion of the beneficiary's duties are supervisory duties while claiming that the supervisory duties do not have to be at a managerial level to comply with the statute contradicts the plain meaning of the statute. The petitioner must provide evidence that the beneficiary's primary duties are in a managerial capacity as defined by statute. As stated at section 101(a)(44)(A)(iv) of the Act, "[a] first-line supervisor is not acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." As noted above, the record lacks any documentary evidence relating to the employees allegedly supervised by the beneficiary and whether the individuals allegedly supervised are professionals.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial position as defined by the Act or that the beneficiary's duties will be primarily managerial duties. In addition, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. The petitioner has not established that the beneficiary has been or will be employed in either 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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.