

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

APR 18 2003

File: WAC 01 276 58765 Office: CALIFORNIA SERVICE CENTER Date:

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

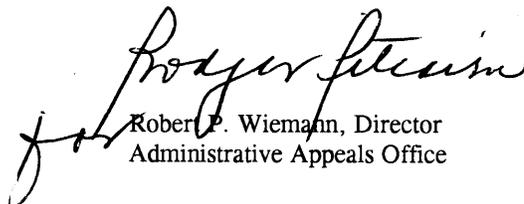
INSTRUCTIONS:

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 Arizona in 1992. It is engaged in the fabrication and installation of rebar steel and associated products. It seeks to employ the beneficiary as its project manager/senior detailing 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 had been employed for the overseas company in a managerial capacity. The director also determined that the petitioner had not established that the beneficiary would be employed in a managerial capacity for the petitioner.

On appeal, counsel for the petitioner, on the I-290B, Notice of Appeal asserts that the director's erred in determining that the beneficiary will not be employed in a managerial capacity. In counsel's brief, counsel asserts that it has been established that the beneficiary has been and will be functioning as a manager and that the petitioner has established that the beneficiary has been and will be functioning in an executive capacity for the petitioner and the overseas entity.

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 first issue in this proceeding is whether the beneficiary was employed in a managerial or executive position for the overseas entity for one year prior to entering the United States as a nonimmigrant.

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.

The petitioner did not provide an initial description of the beneficiary's duties for the overseas entity. The petitioner simply stated that the beneficiary had been "employed in a managerial capacity by the [REDACTED] companies for one year out of the three years prior to her entry into the United States on November 20, 2000." The petitioner stated that the beneficiary's managerial duties and responsibilities were similar to the duties and responsibilities for the petitioner.

The petitioner's duties and responsibilities for the petitioner were described as follows:

Her managerial duties have included the supervision and training of detailing personnel, direction and coordination of the activities of the detailing staff in order to obtain optimum efficiency and economy of operations and maximize profits, and the recommendation of personnel decisions. [The beneficiary] reviews and analyzes reports, records and budgets, and confers with the Branch Manager to obtain data required for planning branch activities, such as new commitments, status of work in progress, and problems encountered. She has been responsible for the assignment or delegation of responsibility for specified work or functional activities. She gives work directions, resolves problems, prepare [sic] schedules, and sets deadlines to ensure timely completion of work. [The beneficiary] evaluates current detailing procedures and practices for accomplishing objectives to develop and implement improved procedures and practices. As Senior Detailing Manager, [the beneficiary] is also responsible for the direction and completion of this important function at the affiliated company. She operates at a senior level and has exercise of discretion over the day-to-day operations of the function. In addition to the supervision of Professional Engineers and Technicians,

[the beneficiary] is responsible for drafting detailed drawings from rough or general design drawings, showing dimensions, material to be used, and other information necessary to make detailed drawings clear and complete. She consults with others on the development of plans and designs for buildings and installations and prepares layout diagrams, including the utilization of Computer Aided Drafting (CAD) systems, to ensure accurate interpretation of designs by the staff she supervises. In the absence of the Branch Manager, [the beneficiary] acts in all respects as the Manager of the affiliated company.

It appears from the initial letter in support of the petition that the petitioner is claiming the beneficiary was engaged in managerial duties under section 101(a)(44)(A) of the Act, for the overseas entity.

The director requested a more detailed description of the beneficiary's job duties for the foreign entity including the percentage of time spent on each of the duties. The director also requested the overseas entity's organizational chart and the beneficiary's position on the chart. The director also requested that the petitioner list the employees under the beneficiary's supervision and include a brief description of their job duties, educational level, and salaries.

In response, the petitioner through its counsel provided the same description of the beneficiary's duties. The petitioner's organizational chart depicted the beneficiary as senior detailing manager reporting to a branch manager. The chart depicted nine senior detailers and eight junior detailers reporting to the beneficiary. The petitioner also provided a portion of the Dictionary of Occupational Titles of the United States Labor Department defining the position of "detailer." The definition indicated a "detailer" drafted detailed drawings of parts of machines or structures from rough or general design drawings. Counsel stated that it was impossible to calculate the percentage of time the beneficiary spent in each of her listed duties as her duties and responsibilities were varied and constantly changing.

The director determined that the petitioner had not sufficiently detailed the beneficiary's duties and had not provided the educational degrees of the beneficiary's subordinates or a description of their job duties. The director concluded that the documentation provided was insufficient to establish that the beneficiary was a manager abroad for immigration purposes.

On appeal, counsel asserts that the petitioner has established that the beneficiary had been and would be functioning as a manager. Counsel also asserts that the beneficiary acted in an executive capacity with the foreign affiliate. Counsel repeats the beneficiary's job description and asserts that the beneficiary

exercised direction over the day-to-day operations of the activity or function for which she had authority, had significant authority over generalized policy, directed the management of the function/department through subordinate employees leaving her free to set policies and goals, and that she functioned at a senior level within the organization, maintained a level of autonomy and received only general and limited direction from her superiors.

Counsel's assertions are not persuasive. Counsel paraphrases elements of the definition of both executive and managerial capacity and then asserts that the beneficiary is eligible as an executive and a manager. See section 101(a)(A)(iii) and (iv); section 101(a)(44)(B)(i)(ii)(iv) of the Act. Moreover, 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). Further, a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity and the statutory definition for managerial capacity if it is representing the beneficiary is both an executive and a manager. The petitioner may not claim a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

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). The petitioner has provided a lengthy description of the beneficiary's job duties and indicates that this job description is pertinent to both the petitioner and the foreign entity. However, it is not possible to conclude from the description provided that the beneficiary has been or would be assigned to work primarily in either a managerial or executive capacity.

The petitioner states that the beneficiary directs and coordinates the activities of the detailing staff in order to obtain optimum efficiency and economy of operations and maximization of profits. She also directs, supervises and trains detailing personnel and is responsible for recommending personnel decisions. These statements are general. The most that can be gleaned from these statements is that the beneficiary may be performing supervisory duties. The beneficiary's assignment of tasks, preparing schedules, setting deadlines is more like a supervisory task than an executive task. The beneficiary's organizational chart does not depict the beneficiary at a senior level position but rather as a first-line supervisor. The record does not support counsel's assertion that the beneficiary is directing functions at a senior level with respect to the detailing position. 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). It appears, rather, that the beneficiary is simply the most experienced staff detailer and is either supervising or mentoring other detailers in the organization.

Counsel's assertion that the petitioner has adequately described how the beneficiary directed the management of the function/department, allowing her to focus on setting policies and goals is also not supported by the record. The petitioner has noted among the beneficiary's "supervisory" tasks that the beneficiary also evaluated current detailing procedures and practices in order to develop and implement improved procedures and practices. The petitioner has not provided documentary evidence of the procedures and practices allegedly evaluated, developed, and implemented by the beneficiary. It does not appear from the petitioner's job description of the beneficiary's duties that this is a primary task performed by the beneficiary. Upon review of the record, the petitioner has not established that the beneficiary was responsible for establishing goals and setting policies for the overseas entity.

Furthermore, the petitioner has not established that the beneficiary was assigned to the overseas entity to primarily perform executive duties. Additionally, the record does not support a conclusion that the beneficiary was assigned to the overseas entity to primarily perform managerial duties. Despite the director's request to provide information regarding the beneficiary's subordinates, the petitioner did not submit all of the requested information. It is not possible to determine from the information contained in the record whether the beneficiary's subordinates were employed in professional positions. A generic description of a detailer, without evidence of the educational level required for the overseas entity's detailer positions, and a lack of evidence regarding duties more specific to the overseas entity's needs do not enable the Bureau to conclude that the overseas entity's detailer positions are professional positions. The beneficiary is at most a first-line supervisor. As the record is deficient in establishing that her subordinates held professional positions, the beneficiary is a first-line supervisor of non-professionals and is not eligible for this visa classification as a manager. See section 101(a)(44)(A)(iv).

Although counsel has used the terms "directed or managed a function/department" the petitioner has not established that the beneficiary is primarily responsible for managing or directing a function or a department. Instead, the record supports the conclusion that the beneficiary has been performing the supervisory services necessary to operate a department. 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)

The second issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a managerial or executive capacity for the petitioner.

As noted above, the description provided by the petitioner does not establish that the beneficiary will be performing managerial or executive tasks for the petitioner. However, the petitioner adds that the beneficiary will also act as project manager on a number of large projects and provided the following job description:

[The beneficiary] is responsible for planning, directing, and coordinating activities at the designated project, and she reviews project proposals and plans to determine time frame, funding and staffing requirements, and materials needed to complete a specified project. She establishes the work plan for each phase of the project, she supervises, directs and assigns project personnel, and she recommends personnel decisions with respect to those employees under her supervision. She confers with project staff to outline the work-plan and to assign duties and responsibilities. She reviews status reports and modifies schedules or plans as required. [The beneficiary] confers with project personnel to provide technical advice and to resolve problems. She reports directly to the President/Branch Manager.

The petitioner's organizational chart depicts the beneficiary as reporting to a detailing manager and shows two project coordinators and ten detailers reporting to her. In response to the director's request for evidence, the petitioner submits a revised organizational chart depicting the beneficiary as project manager reporting to an operations manager and showing five projects and 10 detailers under the supervision of the beneficiary. However, the petitioner noted that entities other than the petitioner employed the project personnel; therefore the petitioner claimed that it could not provide independent documentation of the employees on the various projects.

The director determined that the petitioner had not submitted sufficient documentation to demonstrate that the employees subordinate to the beneficiary's position held professional positions and that the beneficiary was more than a first-line supervisor. The director also determined that the record did not establish that the beneficiary was a functional manager.

On appeal, counsel for the petitioner asserts that the petitioner is not required to establish that the beneficiary performs managerial functions as long as the job duties of the beneficiary could be considered primarily executive. Counsel also asserts that

the record contains sufficient evidence that the petitioner employs two project coordinators and ten detailers who can relieve the beneficiary from performing non-qualifying duties. Counsel finally asserts that the beneficiary oversees the essential function of detailing for the petitioner and that her subordinate staff performs the operational activities allowing the beneficiary to carry out her executive duties.

Counsel's assertions are not persuasive. For the same reasons discussed in the preceding section, the petitioner has not established that the beneficiary's primary assignment within the organization is in an executive capacity. Moreover, the record does not contain sufficient evidence to demonstrate that the petitioner employs two project coordinators and ten detailers. The record contains two organizational charts and the statements of the petitioner and the assertions of counsel to demonstrate the employment of these individuals. Although the director requested independent evidence verifying the employment of these individuals, the petitioner did not submit such evidence. As demonstrated previously, 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, supra*; and the assertions of counsel do not constitute evidence. *Matter of Obaigbena; Matter of Ramirez-Sanchez, supra*. The petitioner has not submitted evidence to overcome the director's determination on this issue.

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.