

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

PUBLIC COPY



AUG 18 2003

FILE: WAC 02 087 54607 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:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

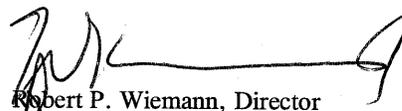
INSTRUCTIONS:

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 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1999 in the State of California and is claimed to be an affiliate of Suspension Supplies, located in Germany. The petitioner is engaged in the business of sales and distribution of automotive accessories. It seeks to employ the beneficiary as the its marketing 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 or would be employed in a managerial or executive capacity.

On appeal, counsel submits a statement disputing the director's 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 as follows:

[The beneficiary] will be planning, developing, and establishing marketing policies, objectives and strategies of this affiliate in accordance with board and senior management directives. She would manage the company advertising and marketing campaigns, in particular evaluating exhibitions, tradeshow, conventions, and potential advertising mediums and arranging for space at meetings and advertising to promote the company's line of automobile accessories.

On March 5, 2002, the director instructed the petitioner to submit, in part, its organizational chart identifying the beneficiary's position, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of all of the employees under the beneficiary's supervision. The petitioner was also asked to provide brief job descriptions, education levels, and

salaries/wages of all of the beneficiary's subordinates, as well as state quarterly wage reports for all employees for the last four quarters.

In response to the above request, counsel provided an organization chart listing the beneficiary's name and position, as well as the names and position titles of nine other employees. Although counsel expressed his disapproval of the director's request for the DE-6 Quarterly Wage statements of the beneficiary's subordinate employees, he provided no explanation as to why he failed to submit the beneficiary's W-2 wage statements that were among the documents requested in the request for additional evidence and which would have addressed the specific issue of the beneficiary's employment and salary.

In addition, counsel also provided a job description of the beneficiary's duties abroad, stating that the beneficiary would perform the same duties in the United States. The following was the description provided by counsel:

[The beneficiary] directed all the company marketing activities, including managing the promotion and direction of the marketing of the company's products and services, the improvement of its image, and the acquisition of market data and information. She monitored market activity for auto accessories in Europe, including the sales and advertising activities of competitors and prices being charged for various types of accessories She also explored the possibility of penetration of new markets, such as the former Soviet bloc nations, and expansion of company marketing activities in existing markets. She directed advertising and marketing campaigns, in particular evaluating exhibitions, tradeshow, conventions, and potential advertising mediums and arranging for space at meetings and advertising to promote the company's line of products. She also submitted reports to senior management re marketing activities and forecasts of anticipated sales and promoted satisfactory customer relations.

The director denied the petition, noting specifically that the organizational chart submitted shows a total of ten employees even though the petitioner initially claimed only three employees in the petition. It is also noted that in response to

the request for additional evidence, the petitioner submitted a list, dated May 14, 2001, naming 20 individuals it claims to employ. As this document is dated well prior to the date the instant petition was filed, the AAO is left to question why the petitioner indicated in the initial filing that it only employs three individuals. As stated in the director's denial, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any 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). On appeal, counsel merely resubmits the same organizational chart and argues that the "inconsistencies" noted by the director are the results of the Bureau's incorrect reading of the submitted documentation. Counsel does not acknowledge the fact that the petitioner claimed three employees in the petition and later submitted an organizational chart showing a total of ten employees. This is not just a matter of the Bureau making improper inferences. The information recited in the denial was obtained directly from documentation provided by the petitioner. Counsel makes absolutely no mention of the confusion further added by the petitioner's submission of a list naming a total of 20 employees. Counsel cannot blame these considerable inconsistencies on what he asserts is the Bureau's incorrect interpretation of the evidence submitted. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, *supra* at 591.

Counsel further asserts that the director improperly concluded that the petitioner failed to provide the beneficiary's job description in the response to the request for additional evidence. The director's comment is hereby withdrawn pursuant to a thorough review of counsel's response to the director's request, which indicates that counsel did, in fact, provide a description of the beneficiary's duties, as requested. Counsel resubmitted the same list of duties on appeal.

Based on the submitted list of duties, counsel asserts that the beneficiary is responsible for marketing and promoting the petitioner's product and therefore can be deemed a functional manager, as marketing and product promotion are essential to the petitioner's financial success. While the Bureau does not dispute that the duties performed by the beneficiary are

significant, it cannot be concluded that the beneficiary is a functional manager when, rather than managing an essential function, the beneficiary is actually performing that function. The key to establishing that the beneficiary fills the role of a functional manager is showing that she refrains from actually performing the marketing function. Contrary to counsel's assertion, the beneficiary does not necessarily have to supervise the employee(s) who would perform the marketing duties in order to establish that she manages the marketing function. Managing a function is not synonymous with managing employees who perform that function. Supervision of personnel who actually perform the marketing duties can be the task of someone other than the beneficiary.

In examining whether the beneficiary is functioning in an executive or managerial capacity, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the beneficiary's job description clearly indicates that the beneficiary has been and will continue to perform the marketing function. She conducts market research, searches for appropriate media in which to market the petitioner's products, and reports her findings to senior management. It has been well established by precedent case law 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Since the beneficiary actually performs marketing-related duties, it cannot be concluded that she is a functional manager.

Finally, counsel separates the burden of proof and the burden of persuasion, arguing that the petitioner only bears the former burden. However, recent case law indicates that "the term 'burden of proof' typically is used to encompass both the burden of production, that is, who is expected to establish the requisite facts, and the burden of persuasion, that is, the degree to which a fact finder must be persuaded based on the evidence presented." *Matter of Y-B-*, 21 I&N Dec. 3 (1998). Thus, the petitioner's burden requires that it not only provide required documentation, but also that it persuade the officer reviewing the record of proceedings that the evidence provided establishes eligibility for the benefit sought. In the instant case, the director determined that the petitioner did not meet its burden. There is no indication, nor has counsel submitted

evidence to support his argument that the director's determination was arbitrary and capricious.

Upon review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The record does not sufficiently demonstrate that the beneficiary will be relieved from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because she 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.