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Citizenship and Immigration Services

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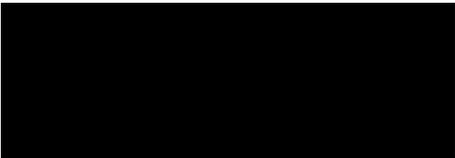
Date: **DEC 9 - 2003**

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:



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 (CIS) 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 branch office of a foreign corporation organized in the Republic of Singapore in January 1997. The branch office registered to do business in the Territory of Guam in November 1999. The branch office is engaged in purchasing seafood products from fishing vessels off loading in the Port of Guam and processing the products for export to Hong Kong. It seeks to employ the beneficiary as its regional 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 would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner provided sufficient evidence to establish that the beneficiary was directing the management of the organization without actually performing many of the non-managerial functions. Counsel asserts that there is no statutory requirement that an organization be large and complex in order to need the services of 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. See 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary's primary assignment for the petitioner will be in a managerial or executive capacity.

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 initially stated that the beneficiary would direct and control operations. The petitioner noted that the beneficiary, "as regional manager, is overall responsible, and the general manager reports to him." The petitioner also indicated that the beneficiary's duties included expanding product sources by traveling to other islands in Micronesia to develop other sources. In response to the director's request for further detail of the beneficiary's duties, the petitioner stated:

He also monitors material supply sources, maintains an on going [sic] relationship with the fishing companies to insure the availability of fish and fish products, and works with the parent company regarding the delivery and marketing of the products in Hong [K]ong.

The director determined that the petitioner had not established a need for an executive because it was only a small four-person business that purchased and exported seafood. The director also determined that the petitioner had failed to establish that the beneficiary's primary assignment would be devoted to executive duties, instead of primarily performing non-qualifying duties. The director further determined that the beneficiary would not qualify as a "manager" because the beneficiary's position was primarily a first-line supervisory position over non-managerial and non-professional employees. The director finally determined that the beneficiary could not be deemed a functional manager because the petitioner had not shown that the beneficiary would be managing a function rather than performing the duties associated with the function.

Counsel for the petitioner submitted a motion to reopen and reconsider the director's decision. Counsel indicated that the petitioner employed numerous intermittent workers to offload the catch of fishing vessels. Counsel explained that the petitioner was involved in 16 offloading operations per month and that each operation involved 20 to 22 workers. Counsel also indicated that the general manager, under the direction of the beneficiary,

monitored vessel arrivals, insured necessary materials were on hand, scheduled the offloading operation, hired the workers needed, and supervised the operation. Counsel also referenced previously submitted Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements for 2001. Counsel noted that the IRS Forms W-2 showed that the petitioner intermittently employed 67 persons and paid salaries in the amount of \$82,810.38 in the year 2001.

Counsel contends that the beneficiary determined: (1) the feasibility of creating the U.S. subsidiary; (2) established its goals and policies; (3) directed the petitioner's management; and (4) hired, fired, and assigned responsibility to the general manager and operations manager to set up, manage, and direct the activities of all aspects of the fish offloading operations. Counsel also contends that the beneficiary's subordinate managers managed the offloading function, which is one of the petitioner's essential functions, as well as, supervised other employees and exercised direction and control over the workers engaged in the offloading operations.

The director reopened the matter but ultimately determined that the petitioner had not established that the beneficiary was directing the management of the organization without actually performing many of the non-managerial functions. The director further determined that the petitioner had not established that the managers under the beneficiary's supervision were performing duties that were primarily managerial. The director, therefore, dismissed the motion.

On appeal, counsel again asserts that the managers subordinate to the beneficiary are functional managers, even though they also supervise others. Counsel also asserts that the size and complexity of a company has no bearing on its need for managers.

Counsel's claims are unpersuasive. When examining the beneficiary's executive or managerial capacity, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner describes the beneficiary as responsible for the organization as well as performing the duties necessary to maintain and expand the organization. Furthermore, the beneficiary is charged with expanding the petitioner's supply sources and for working with the foreign entity regarding product marketing and delivery. It is not possible to discern from this general description whether the beneficiary's primary assignment is to provide executive or managerial services to the petitioner, or actually provide the operational tasks of a buyer and marketer of the petitioner's product. 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 record is also unclear whether the petitioner is claiming that the beneficiary is primarily a manager, primarily an executive, or both. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In this matter, the description of the beneficiary's duties is insufficient to satisfy all the elements of either statutory definition.

On motion and appeal, counsel for the petitioner focuses on the beneficiary's responsibility to the overall organization and asserts that the beneficiary devotes substantially all of his time to managerial duties. Counsel asserts that the beneficiary is both a people and a functional manager.

The petitioner must demonstrate that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees to establish the beneficiary's eligibility for this visa classification as a "people manager." The petitioner, through its counsel, confirms that it does not employ individuals in professional positions.

Counsel claims, however, that the beneficiary's subordinate "managers" direct the offloading function, an essential function of the petitioner, as well as, supervise other employees and exercise direction and control over the workers engaged in the offloading operations. If counsel is claiming that the beneficiary's subordinate employees are managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the subordinate employees' daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive description of the subordinate employees' duties demonstrating that the subordinate employees manage the function rather than perform the duties relating to the function.

In this matter, the record does not contain a comprehensive description of the subordinate employees' duties sufficient to demonstrate that the subordinate employees manage an essential function. For example, the record does not support a claim that the either the general manager or the operations manager operates at a senior level within the organization or with respect to the function purportedly managed. Moreover, the record does not contain sufficient evidence to support a claim that the beneficiary's subordinate employees primarily perform supervisory or managerial duties over the petitioner's intermittent employees. Counsel's assertions in this regard are insufficient. 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). 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).

In sum, the record is deficient in establishing that the beneficiary's subordinate "managers" are managers as defined for immigration purposes. Moreover, the petitioner does not appear to claim that the beneficiary's subordinate "managers" primarily perform supervisory duties.

The record also does not substantiate counsel's assertion that the beneficiary manages an essential function. Counsel suggests on appeal that every organization requires a manager. But to allow the broad application of the term "essential function" to include all individuals who head organizations would render the term meaningless. Again, if counsel claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to managing the essential function. Of further note, counsel ignores the petitioner's initial description of the beneficiary's duties regarding the beneficiary's time spent organizing the petitioner's supply of fish products and working with the parent company to deliver and market the products. The record does not contain sufficient evidence to establish the primary focus of the beneficiary's daily duties.

The size and complexity of the petitioner's organization is not dispositive of this matter. The petitioner has failed to provide a comprehensive description of the beneficiary's duties, neglected to apportion the amount of the beneficiary's time spent on providing operational services to the petitioner, and failed to demonstrate that the beneficiary's primary assignment is to supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function.

Beyond the decision of the director, the petitioner also does not provide a comprehensive description of the beneficiary's duties for the foreign entity. The petitioner indicates that the foreign entity hired the beneficiary to promote the expansion of the company operations to other countries. This statement does not support a conclusion that the beneficiary's assignment for the foreign entity was in a primarily managerial or executive capacity. For this additional reason, the petition will not be approved.

Moreover, the petitioner states on the Form I-140, Immigrant Petition for Alien Worker that the beneficiary will be compensated in the amount of \$36,000 per year. However, the petitioner also states that the beneficiary will receive \$12,000 per year as well

foreign employer, the foreign employer had not actually paid for the stock prior to April 2002. The inconsistencies contained in the documentary evidence on actual payment for stock issued have not been explained. 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 (BIA 1988). Moreover, the beneficiary's letter in response to the director's request for evidence implies that the beneficiary is able to run the petitioner as a sole proprietorship. Thus, the record raises concerns regarding the actual relationship between the petitioner and the beneficiary's foreign employer.

For these additional reasons, the petition will not 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.