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

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536



File: WAC 02 201 50866

Office: CALIFORNIA SERVICE CENTER

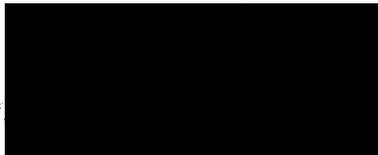
Date: **DEC 16 2003**

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 was established in 1982 in the State of Texas. It is engaged in importing metal fabrication equipment manufactured by its parent company and modifying and customizing the equipment for the United States market. It seeks to employ the beneficiary as its California branch 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 primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director erred when finding that the beneficiary was not performing in a managerial capacity.

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).

Counsel clarifies on appeal that the petitioner is seeking to employ the beneficiary in a managerial capacity; therefore, the issue in this proceeding is whether the beneficiary has been and will be performing primarily managerial duties for the petitioner.

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 that "as Branch Manager at the California facility, [the beneficiary] has been in charge of starting up the office, commencing and managing sales and servicing of equipment to customers, as well as training customer employees." The petitioner added, "He will also be responsible for hiring and training any new local employees as they are hired." The petitioner stated that it was seeking the beneficiary's

permanent assignment in the United States to assist in opening additional offices.

The director requested a more detailed description of the beneficiary's duties, the petitioner's organizational chart, and a description of job duties, educational levels, and annual salaries for all employees under the beneficiary's supervision.

In response the petitioner indicated that the beneficiary allocated his time among various job duties as follows:

Personnel matters - 5 percent

Corresponding with Senior Management - 10 percent

Training of service people and assisting in difficult service matters - 20 percent

Meeting with existing and prospective customers to try to find solutions to either service or sales related problems - 15 percent

Marketing - 20 percent

Assisting distributors in sales calls by giving technical advice, entertaining customers who visit the Costa Mesa showroom - 30 percent

The petitioner also provided its California Form DE-6, Employer's Wage and Withholding Report verifying the employment of the beneficiary, and individuals in the positions of office manager and service technician.

The director determined that the description of the beneficiary's job duties did not support a conclusion that the beneficiary was performing managerial or executive duties.

On appeal, counsel for the petitioner contends that the beneficiary satisfies every element of the statutory definition of managerial capacity. Counsel asserts that the beneficiary manages its California branch, a critical component of the petitioner's business. Counsel also asserts that the beneficiary supervises a staff of professionals, and manages an essential function or subdivision of the petitioner. Counsel states that the beneficiary has authority to hire and fire personnel and also functions at a senior level with respect to the California branch. Finally, counsel avers that the beneficiary exercises discretion and direction over the day-to-day operations of the California branch. Counsel repeats that the petitioner's primary operations are selling and servicing industrial equipment. Counsel states that two service technicians perform the necessary servicing and that a dealership network carries out the sales function. Counsel indicates that in addition to the beneficiary's supervision of the

servicing technicians, the beneficiary also bears the responsibilities of a sales manager. Counsel cites two unpublished decisions in support of his assertions.

Counsel's assertions are not persuasive. 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). 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 beneficiary's duties are primarily operational and supervisory. 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 beneficiary spends 65 percent of his time assisting distributors with sales calls, entertaining customers, and marketing the petitioner's product. The petitioner has not provided evidence that other individuals perform these basic operational tasks.

In addition, the record does not support counsel's assertion that the beneficiary supervises a professional staff of servicing technicians and sales personnel. 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). The record fails to show that these positions require professional training, rather than technical or sales expertise. The service technicians and salespersons' duties do not allow a conclusion that these positions are professional positions. The beneficiary's duties of training and supervising the in-house technicians and the outside dealers are duties of a first-line supervisor of non-professional, non-managerial, and non-supervisory personnel. See section 101(a)(44)(C) of the Act.

The record also fails to establish that the beneficiary manages the petitioner's essential function. The term "essential function" generally applies when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. To allow the broad application of the term "essential function" to include all individuals who head offices would render the term meaningless. 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. In

addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

In sum, the beneficiary's duties for the petitioner do not fulfill the specific criteria of section 101(a)(44)(A)(ii) of the Act. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for manager. The record does not support a conclusion that the beneficiary's primary assignment for the petitioner is in a managerial capacity. Instead, the beneficiary is responsible for performing many of the operational activities necessary to set up a branch office, market the petitioner's product, assist in the selling of the petitioner's product, and expand the petitioner's network of dealers.

Counsel's citation to unpublished cases carries little probative value. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

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.