

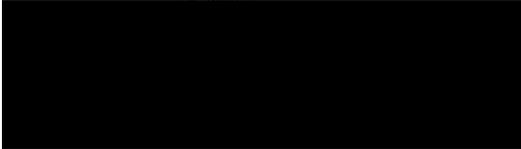
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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



File: WAC 00 261 53799 Office: VERMONT SERVICE CENTER

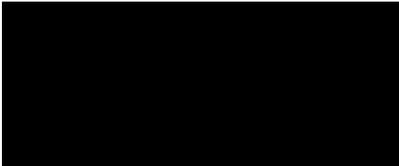
Date: **DEC 17 2003**

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, Vermont 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, either as a branch office or subsidiary of a prominent publicly traded industrial company. It is engaged in the manufacture and supply of plastics. It seeks to employ the beneficiary as its technical development engineer. 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 beneficiary's position requires the duties of a manager or executive, that the beneficiary possesses the necessary experience to perform managerial and executive duties, and that the beneficiary will perform supervisory level duties.

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 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.

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 stated on the I-140, Immigrant Petition for Alien Worker, that the beneficiary's job duties entailed providing technical support to customers, development, and execution of productivity.

The director requested that the petitioner submit complete position descriptions for all the individuals employed in the beneficiary's department in the United States, including the beneficiary's position.

In response the petitioner, through its attorney, indicated that the beneficiary would manage, coordinate, and supervise various office personnel and other technical development engineers as well as provide support and technical guidance to other engineers and customers. The petitioner indicated that the beneficiary would also coordinate the support to account management.

The petitioner stated that the beneficiary's technical group must have the ability to understand technical drawings and specifications and must analyze interaction between resins produced and distributed by the petitioner and equipment and final products. The petitioner indicated that the technical group must also analyze the design of parts and molds and must provide support to its customers in evaluating and explaining all characteristics, usage, and processing of specific plastic resins.

The petitioner provided its organizational chart showing the beneficiary as one of six technical development engineers. The chart also showed an assistant and resident application engineer reporting to the beneficiary.

The director determined that the preponderance of the beneficiary's duties would be operational and not managerial. The director observed that, although the beneficiary supervised an engineer, the record did not substantiate that this was the beneficiary's primary function.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in the same capacity in which he was employed for the petitioner's affiliate in Mexico. Counsel asserts that the beneficiary was responsible for managing the direction and coordination of the activities and operations of the technical

development engineering component of the petitioner's foreign affiliate. Counsel asserts that the beneficiary's subordinate employees in Mexico performed the duties of the component while the beneficiary gave guidance to the staff on how to perform their duties. Counsel asserts that the engineers subordinate to the beneficiary in Mexico were professionals and were required to have bachelor degrees. Counsel asserts that the beneficiary managed an essential function for the petitioner's affiliate by providing technical support to the petitioner's customers. Counsel states that the beneficiary was the head of his department in Mexico and was functioning at a senior level with respect to the department. Finally, counsel asserts that the beneficiary had wide discretion regarding the manner in which he organized his department.

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 petitioner's initial description of the beneficiary's job duties is indicative of an individual providing operational services to the petitioner. The petitioner stated that the beneficiary's job function would be to provide technical support to customers. 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).

Counsel's response to the director's request for evidence only shows that the beneficiary is one of several senior technical staffing specialists. The record does not sufficiently substantiate the managerial functions, if any, of the beneficiary's 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). The petitioner's organizational chart shows that the beneficiary is one of several technical development engineers and does not sufficiently establish that the beneficiary's primary function is to supervise others. Instead, the beneficiary primarily provides technical assistance to customers and as the senior member of the three-person technical group provides guidance to a less senior engineer.

The record does not support counsel's assertion that the beneficiary's position or the positions subordinate to the beneficiary, either for the Mexican affiliate or the United States petitioner, are professional positions. The record is deficient

in establishing that the positions require professional training, rather than technical expertise in assisting customers to use the petitioner's product. Moreover, the director observed, the record does not substantiate that the beneficiary's primary assignment was to give guidance to the assistant and to the resident applications engineer.

The record also does not substantiate counsel's assertion that the beneficiary manages the petitioner's essential function of providing technical support to the petitioner's customers. 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.

Further, counsel's statements that the beneficiary was the head of his department in Mexico and was functioning at a senior level with respect to the department in Mexico and would be performing the same duties in the United States is not persuasive. As noted previously, the petitioner's organizational chart shows the beneficiary to be one of several technical development engineers. There is no clear delineation between the types of duties performed by the other technical development engineers and the beneficiary. Moreover, all the technical development engineers report to a technical manager, the individual more likely to be deemed the head of the technical support department.

In sum, the record does not support a finding that the beneficiary's duties for the Mexican affiliate or the United States petitioner was or would be in a managerial capacity. The information in the record establishes only that the beneficiary's position is a senior technical position. The evidence does not establish that the beneficiary manages a component or an essential function of the petitioner. The record does not establish that the beneficiary's primary task is to supervise or control the work of other professional employees. The evidence does not sufficiently demonstrate that the beneficiary operates at a senior level within the organizational hierarchy of his department. The petitioner has not adequately demonstrated the executive or managerial capacity of the beneficiary's assignment.

Beyond the decision of the director, the petitioner has not established that the beneficiary's foreign assignment was in a managerial or executive capacity for the same reasons noted above.

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.