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Citizenship and Immigration Services

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



File: WAC 02 223 51551

Office: CALIFORNIA 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:



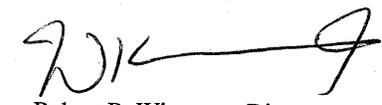
INSTRUCTIONS:

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 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 publicly traded company founded in 1962 and incorporated in the State of Delaware. It is a manufacturer of semiconductors and integrated circuits. It seeks to employ the beneficiary as its "MOSFET"¹ product-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 manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial capacity for the petitioner.

On appeal, counsel contends that the beneficiary's position is a functional manager position and the petition should be approved.

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

¹ MOSFET is the abbreviation for Metal Oxide Semiconductor Field Effect Transistor.

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 will perform 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 the beneficiary would manage the function of marketing the MOSFET product line. The petitioner stated the position responsibilities included directing and coordinating business development for MOSFET sales, managing "Power MOSFET" technical issues, originating new products for future sales, developing marketing plans, creating product "roadmaps" for the MOSFET product line, driving sales on existing products, setting prices, benchmarking, and identifying new MOSFET market trends. The petitioner included its

organizational chart showing the beneficiary reporting to the market development vice-president and the senior director of product marketing.

The director requested additional evidence to support the petitioner's claim that the beneficiary's assignment would be in a primarily managerial capacity.

The petitioner, through its attorney, confirmed that the petitioner was claiming that the beneficiary's position would be a functional manager position and not a staff manager position. Counsel asserted that the product marketing manager position involved the management of an essential function because the product-marketing manager ensured that the petitioner's products and quality of service met company standards and customer expectations. Counsel asserted further that the beneficiary would exercise discretion in managing the product marketing function and would indirectly manage the work of other professionals to the extent that their duties related to the product marketing function.

The director determined that the petitioner's description of the beneficiary's duties was more indicative of an individual performing the work associated with the product marketing position rather than managing the product marketing position. The director concluded that the petitioner had not established that the beneficiary would be employed in a managerial or executive position.

On appeal, counsel asserts that the beneficiary is charged with the responsibility of conceiving, studying, developing, and launching all new products in the computer market. Counsel states that the computer market for the MOSFET product line comprises 31 percent of the petitioner's total revenue. Counsel contends that the director substituted verbs in the petitioner's description of the beneficiary's duties to conclude that the beneficiary was performing work associated with the product marketing position rather than managing the function. Counsel asserts that the beneficiary is the sole person in charge of the MOSFET product line for the computer segment and does not take direction from others in the performance of his duties and does not obtain assignments for each step of the process. Counsel states that it is the beneficiary who "originates new product ideas, directs marketing research firms in marketing information gathering, initiates new product development with members of the Research and Development, Package Development, and Product/Process Engineering Departments at all levels, and manages the product launch into the marketplace. Counsel concludes by asserting that the beneficiary defines the objectives and it is other people who actually perform the tasks. Counsel also provides a chart identifying each phase of the beneficiary's duties and the corresponding groups the beneficiary

interfaces with to obtain the objectives of the product marketing position.

Counsel correctly notes that the statutory definition of managerial capacity provides for two types of managers, either a staff manager or a functional manager. See § 101(a)(44)(A) of the Act. The petitioner and its counsel have identified the beneficiary as a functional manager and described the function as marketing the MOSFET product line to develop and grow the MOSFET business. Counsel also articulated the importance of marketing the MOSFET product line to the petitioner's business, as the MOSFET product line comprises 31 percent of the petitioner's total revenue.

On appeal, counsel further details the beneficiary's duties as they relate to marketing new products for the MOSFET product line. Counsel contends that the beneficiary's duties extend to defining the marketing objectives for the MOSFET product line but do not include actually performing the duties associated with the various phases of the marketing, including information gathering, determination of the feasibility of new products, development of a new product, and product launch. Counsel identifies the groups that the beneficiary uses to perform the various tasks associated with creating, developing, and launching a new product. However, counsel's assertions are not sufficient. 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).

In addition, neither counsel nor the petitioner have provided documentary evidence that the petitioner or the beneficiary have hired market research firms, or that the beneficiary has utilized the petitioner's research and development department to perform development work related to the MOSFET product line. Counsel and the petitioner have not provided documentary evidence that the beneficiary works through other departments or outside services to advertise new products, set prices, promote new products, present new products to customers, or to train others to use new products. 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).

Further, the petitioner initially stated the duties of the beneficiary's position included managing MOSFET technical issues, driving sales on existing products, setting prices, benchmarking, and identifying new MOSFET market trends as well as originating, developing, and launching new products. Counsel's assertions and elaboration on the beneficiary's duties, on appeal, focus

primarily on the beneficiary's duties relating to new products in the petitioner's MOSFET product line. The record does not establish how the beneficiary's time is allocated between originating and developing new products, driving demand for existing products, resolving technical issues, and researching market trends. Moreover, the record does not show who performs the technical work, visits customer's work sites, and identifies market trends if not for the beneficiary. The petitioner has failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial functions. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time he spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as noted above, do not fall directly under the traditional managerial duties as defined in the statute. The AAO cannot conclude that the beneficiary is primarily performing the duties of a function manager. See *Ikea US, Inc. v. U.S. Dept. of Justice, supra*.

Although counsel asserts the beneficiary is the person in charge of the MOSFET product line and does not take direction from others in the performance of his duties and does not obtain assignments for each step of the process, the record contains two significant deficiencies. First, neither counsel nor the petitioner's assertions and statements are supported by sufficient documentary evidence. Second, the record does not substantiate how much time the beneficiary spends working through others to manage the product marketing function, how much time the beneficiary spends inventing new products, and how much time the beneficiary spends performing the operational tasks of market research, resolving technical problems, and otherwise ensuring customer satisfaction.

In sum, the petitioner has provided some information through its counsel's more elaborate detail regarding the beneficiary's duties and the provision of a chart, but the record is not sufficient to establish that the beneficiary's primary assignment is managing an essential function of the petitioner.

Beyond the decision of the director, the petitioner does not establish that the beneficiary's employment for the foreign entity was in a managerial capacity. The petitioner states that the beneficiary's position was field application manager (technical sales support manager). The duties of this position involved managing technical issues, promoting a product to customers, and originating new products for the Korean market. The petitioner notes that an employee with a bachelor's degree in the Chinese language reported to the beneficiary. The petitioner does not provide sufficient detail to allow a conclusion that the beneficiary managed an essential function or supervised an employee in a professional position. The petitioner has not established that the beneficiary's overseas assignment was primarily in a managerial 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.