

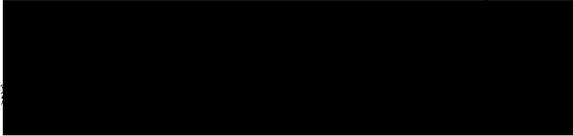
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



File: WAC 02 146 52987

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 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 corporation established in July 1998 in the State of California. It provides international shipping and air freight services. It seeks to employ the beneficiary as its 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 would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the evidence establishes that the beneficiary performs executive and managerial duties and supervises professional and supervisory employees.

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 will be performing primarily managerial or executive 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 initially stated that the beneficiary's position as branch manager involved executive duties. The petitioner indicated that:

As Branch Manager, [the beneficiary] coordinates activities of over 10 employees with further hiring and firing authorities[,] manages company's contract negotiations, [and] supervises operational and financial matters of the U.S. Company. He is also responsible for developing, planning and implementing [the] company's goals and objectives and reports directly to the Board of [the] Parent Company in Korea.

The petitioner also provided its organizational chart showing the beneficiary as the director/branch manager and directly supervising a general manager of the sales and marketing department and an assistant general manager in the accounting and administrative department. The chart showed a tier of three individuals reporting to the general manager. The three individuals held positions identified as an operation supervisor of an import and export department supervising two employees, a branch manager in San Francisco supervising an assistant manager, and an assistant general manager supervising three employees.

The director requested that the petitioner submit a more complete description of the beneficiary's duties in the United States. The director requested the job titles and position descriptions for all employees under the beneficiary's direction. The director further requested copies of the petitioner's California Form DE-6, Employer's Quarterly Wage and Withholding Reports.

In response, the petitioner stated the beneficiary's job duties:

As the Branch Manager, [the beneficiary] focuses his efforts entirely on the supervision of the 5 operations and 13 staff at the U.S. Company with its offices and warehouse in Los Angeles and San Francisco areas. There are five different operations that Mr. [REDACTED] [sic] supervises: Accounting, Ocean Freight, Air Freight, CFS (Container Freight Station) and Warehouse operations. These operations are each managed by the operations managers, who currently report to [the beneficiary]. We have previously submitted U.S. Company's organizational chart and list of employees supervised

by [the beneficiary] with their educational background and brief job descriptions.¹

The petitioner's California Form DE-6 for the quarter ending March 31, 2002, the quarter in which the petition was filed, confirmed the employment of 11 individuals, nine of whom appeared on the petitioner's initial organizational chart. The nine individuals held the positions of director/branch manager (the beneficiary's position), general manager of sales and marketing, assistant general manager of accounting and administration, San Francisco branch manager, assistant general manager of the warehouse and container freight station, and four operators.

The petitioner's brief descriptions of duties for the verifiable filled positions showed the general manager of sales and marketing as the only individual employed in a sales and marketing capacity for the petitioner. The assistant general manager of accounting and administration was the only individual performing accounting and administrative functions. The job description for the assistant general manager of the warehouse and container freight station indicated that the individual in this position supervised the warehouse and container freight station. The job description for the San Francisco branch manager indicated that the individual in this position supervised all the San Francisco branch affairs. The petitioner did not provide explanatory job descriptions for the operators.

The director determined that the petitioner's description of the beneficiary's job duties was not sufficient to warrant a finding of executive or managerial capacity. The director observed that the petitioner labeled five of its employees managers. The director concluded that the beneficiary would be assisting in the performance of non-qualifying duties. The director further determined that the beneficiary's position would be, in essence, a first-line managerial position over non-professional and non-managerial employees. The director also determined that the petitioner had not established that the beneficiary would be a functional manager. The director concluded that the record contained insufficient evidence to demonstrate that the beneficiary's position had been or would be in a primarily managerial or executive capacity.

¹ In response to the request for evidence, the petitioner submitted a revised organizational chart showing employees not depicted on the initial organizational chart, as well as, employees in different positions. Because a petitioner must establish eligibility when the petition is filed, the AAO will review the initial organizational chart and the petitioner's California Form DE-6 for the period including the date the petition was filed. The AAO notes that the petitioner's California Form DE-6 ending March 31, 2002 corresponds more closely to the initial organizational chart than the petitioner's revised organizational chart.

On appeal, counsel for the petitioner asserts that the beneficiary supervises professional positions. Counsel cites the position of accounting manager as an example of a professional position. On appeal, counsel contends that the beneficiary is employed in an executive position. Counsel claims that the beneficiary directs the management of the entire United States operation and has the authority to hire and fire employees as well as supervises professional positions. Counsel concludes by asserting "[T]he [b]eneficiary is an executive who primarily performs executive/managerial duties while supervising professional and/or managerial workers employed in professional positions."

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). Moreover, neither the petitioner nor counsel clarify whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. 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.

When examining the beneficiary's executive or managerial capacity, CIS will look first to the petitioner's description of job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's initial description of the beneficiary's duties is not comprehensive. The petitioner paraphrases elements of the definitions of managerial and executive capacity without conveying an understanding of the beneficiary's actual daily duties. See sections 101(a)(44)(A)(iii) and 101(a)(44)(B)(ii) of the Act. It is not clear from the remaining portion of the description whether the beneficiary's coordination of the activities of the petitioner's employees and the supervision of operational and financial matters are duties that are primarily managerial duties or are duties of a first-line supervisor. 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. See section 101(a)(44)(A)(iv) of the Act.

The description of the beneficiary's duties provided in response to the director's request for evidence does not contribute to a further understanding of the beneficiary's daily duties. The petitioner states: "[T]he beneficiary focuses his efforts entirely on the supervision of the 5 operations and 13 staff at the U.S. company." The description of the beneficiary's duties is also confusing in that the petitioner references another individual when describing the beneficiary's duties. 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).

A review of the record does not substantiate counsel's contention that the beneficiary supervises individuals holding professional positions. On appeal, counsel asserts that the accounting manager holds a professional position. However, the petitioner does not consistently identify a person holding an accounting manager position. The petitioner identifies a position as an assistant general manager who is involved in accounting and administration. The record does not contain evidence that the individual holding this position devotes the majority of her time to providing professional services to the petitioner. 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). Furthermore, the record does not substantiate that the individual holding this position provides managerial or supervisory services for the petitioner.

The record is also deficient in describing the duties of other positions that are labeled managerial or supervisory. The organizational chart provided is not sufficient to establish that the positions are managerial or supervisory. Again, 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*, *supra*; *Republic of Transkei v. INS*, *supra*; *Matter of Treasure Craft of California*, *supra*.

The record also fails to support counsel's claim that the beneficiary is performing primarily in an executive capacity. The description of the beneficiary's duties is not comprehensive. The record does not contain evidence that the beneficiary's main function was or would be to establish goals and policies or to otherwise direct the management of the organization. Once more, the petitioner has failed to supply sufficient evidence to establish the claim that the beneficiary's primary assignment is in an executive capacity. *Ikea US, Inc. v. INS*, *supra*; *Republic of Transkei v. INS*, *supra*; *Matter of Treasure Craft of California*, *supra*.

In sum, the record does not support a finding that the beneficiary's duties are or will be in a managerial or executive capacity. The most that can be gleaned from the record is that the beneficiary is a supervisor of non-professional, non-managerial, and non-supervisory employees.

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.