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U.S. Department of Justice

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Immigration and Naturalization Service
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 01 254 53763

Office: CALIFORNIA SERVICE CENTER

Date:

FEB 27 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)

IN 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 Service 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 and the matter is now before the Administrative Appeals Office. The appeal will be dismissed.

The petitioner is a branch office of an organization established in India. It is certified to transact business in the State of California as of November 2000. It is engaged in providing software services. It seeks to employ the beneficiary as its vice-president. Accordingly, the petitioner seeks 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 for the United States entity.

On appeal, counsel for the petitioner asserts that the beneficiary's position is managerial and executive in nature.

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.

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.

The issue in this proceeding is whether the beneficiary will be performing managerial or executive duties for the United States

enterprise.

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 provided the following job responsibilities for the beneficiary's position of vice-president/technology:

1. Building a team for technology delivery;
2. Provide necessary technology training to the team;
3. Identify and recruit technical architects and project managers[;]
4. Supervise the Project Managers and Technical Architects;
5. Act as a Liaison [sic] between [the overseas entity] and [the petitioner] and be responsible for smooth and timely execution of projects for various national and international customers;
6. Ensure highest degree of customer satisfaction and maintain customer relationship;
7. Identify new technology initiatives and R&D activities for the company; [sic]

The director requested that the petitioner submit a more detailed description of the beneficiary's duties in the United States and include the percentage of time the beneficiary spent on each of the listed duties. The director also requested that the petitioner submit an organizational chart identifying the beneficiary's position on the chart and the employees under the beneficiary's supervision, including the employees' job titles and brief position descriptions. The director further requested the petitioner's California DE-6, Quarterly Wage Reports.

In response the petitioner provided an organizational chart dated June 2001, showing the beneficiary as overseeing several departments in both the overseas office and the United States branch office. The chart listed the names of individuals heading the various departments in the Indian office and names various positions in the United States office for which employees had not yet been hired.

The petitioner also provided its California Form DE-6, Quarterly Wage and Withholding Report for the pertinent quarter ending June 30, 2001. The California Form DE-6 reflected nine employees including the beneficiary. The organizational chart did not contain the names of any of the employees listed on the petitioner's California DE-6 except for the beneficiary.

The director determined, based on the lack of evidence in the record, the petitioner had not established that the beneficiary would be employed as a manager or executive.

On appeal, counsel for the petitioner submits a letter written by the operations manager on behalf of the petitioner. The petitioner indicates in the letter that the petitioner had erroneously submitted a global organization chart rather than an organization chart describing the requested United States entity's

hierarchy. The petitioner also states that the beneficiary heads and manages the services and solutions delivery department of the petitioner and is functioning at a senior level in the organization. The petitioner states further that the beneficiary supervises three professionals and is responsible for hiring and firing in her department. The petitioner also references various goals and standards set by the beneficiary. The petitioner further notes that the beneficiary receives only general direction from the president in performing her duties. The petitioner also provides a revised organizational chart depicting three employees subordinate to the beneficiary in the positions of software engineer and program analyst.

It is noted that the petitioner does not clarify whether the beneficiary claims 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.

In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner initially submitted a broad position description for the beneficiary that refers, in part, to duties such as interacting with the overseas entity, executing projects, and ensuring customer satisfaction. It is not possible to determine from these duties whether the beneficiary will be performing executive or managerial duties with respect to these activities or will be actually performing the activities. The beneficiary's duty of identifying new technology initiatives and research and development activities is more indicative of an individual performing operational tasks for the petitioner. 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 remaining portion of the position description includes duties such as supervising managers and technical architects, providing training, building a team, and recruiting technical architects and project managers. These duties clearly reflect an individual who will be acting as a supervisor. However, it is not clear from the evidence submitted with the petition and the information submitted in response to the request for more evidence, that the beneficiary would be supervising managerial, supervisory, or professional employees. At the time the director made her decision, the petitioner had not provided sufficient evidence to establish that the beneficiary had met the criteria set out in the definition of "managerial capacity."

Although the petitioner explains on appeal that its global organizational chart was submitted in error and that the beneficiary did supervise professional employees as well as an essential function, this information cannot be considered on appeal. Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In addition, even if these three individuals are employed in professional positions, the petitioner has not adequately established that at the time the petition was filed the beneficiary's primary duty was supervising these individuals. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248,249 (Reg. Comm. 1978). Likewise, the petitioner has not established that the beneficiary will primarily manage an essential function of the petitioner.

The Service cannot conclude that the beneficiary primarily manages the organization or an essential function of the petitioner, and supervises and controls the work of other supervisory, professional, or managerial employees. The record does not support such a conclusion. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been or will be employed in either a primarily managerial or executive 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.