

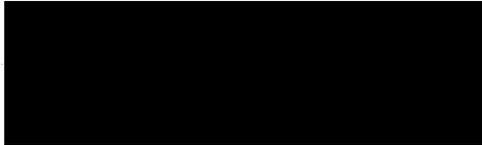


B4

U.S. Department of Justice
Immigration and Naturalization Service

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



File: WAC 01 244 56423

Office: CALIFORNIA SERVICE CENTER

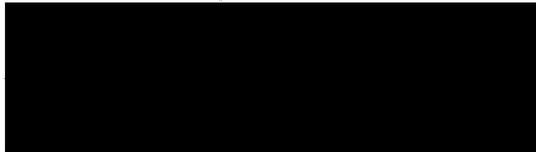
Date: JAN 31 2003

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:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is organized as a sub-chapter "S" corporation and is engaged in manufacturing corrugated boxes and packaging materials. It seeks to employ the beneficiary as its technical customer service manager. Accordingly, it 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 demonstrated that the beneficiary had been employed in a managerial or executive capacity outside the United States for at least one year by a qualifying entity.

On appeal, counsel for the petitioner asserts that the Service incorrectly interpreted the beneficiary's duties for the foreign entity and that the beneficiary was a functional manager for the foreign entity.

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.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of

the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary was employed by a qualified foreign entity in a managerial or executive capacity for one year in the three years prior to the beneficiary's application for immigrant status on May 23, 2001.

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 submitted a letter in support of the petition that stated:

She was employed by Harbor Packaging de Mexico as a Technical Customer Service Representative from October 1997 to April 1999 and in the main office in Poway, California, since April 1999 in L-1B status. In that position, she has been responsible for liaison between customers in Tijuana and Harbor Packaging USA, sales representatives, and the production department.

Counsel states in a letter accompanying the petition that "the petitioner's letter (Exh. A) describes the experience of the beneficiary in a specialized knowledge position at the Mexican affiliate from October 1997 to April 1999."

The director requested a more detailed description of the beneficiary's duties abroad.

In response, the petitioner provided the following description of the beneficiary's duties for the foreign entity:

[The beneficiary] managed the function of liaison between the U.S. and Mexican offices and between the company and customers. As in the proposed U.S.

managerial position, she managed liaison between sales representatives, the production department, and customers in the U.S. and Mexico. She established and monitored procedures to ensure quality and cost effectiveness of both finished orders and unfinished material sent between offices for further processing, and to ensure timely delivery of orders. She resolved problems with customers and between the U.S. and Mexican companies.

The petitioner also added that at the time of the beneficiary's employment abroad she was the sole representative and was functional manager of the customer service function, but did not supervise other employees.

Counsel asserts in a letter accompanying the response that the beneficiary's experience fulfills the regulatory requirements of a minimum of one year of employment in the foreign affiliate as a manager or specialized knowledge employee during the three years prior to her transfer to the United States.

The director determined that the beneficiary performed all the duties of her job position with the foreign entity herself and was not managing a department or achieving the desired goals through the management of other employees. The director concluded that the petitioner had not established that the beneficiary had been employed outside the United States for at least one year in a managerial or executive capacity by a qualifying entity.

On appeal, counsel for the petitioner asserts that the beneficiary was a functional manager, in that she functioned at a senior level in the organizational hierarchy and with respect to the function managed. Counsel also asserts that the beneficiary established the customer service function that is now staffed by a group of professionals. Counsel further cites several unpublished decisions to support her assertions. Counsel also submits a letter from the petitioner's vice president of sales that provides a further description of the beneficiary's duties for the foreign entity.

Counsel's assertions are not persuasive. 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's initial description of the beneficiary's job duties is confusing. It is unclear if the petitioner is providing a description for the beneficiary's position for the foreign entity or is describing the beneficiary's position with the petitioner. Counsel, however, appears to believe the beneficiary's experience for the Mexican entity involved specialized knowledge and does not refer to the beneficiary managing a function.

The petitioner's description in response to the director's request

for evidence is broad. The position description vaguely refers, in part, to duties such as "manag[ing] liaison between sales representatives, the production department, and customers in the U.S. and Mexico," and "establish[ing] and monitor[ing] procedures to ensure quality and cost effectiveness," and "resolv[ing] problems with customers and between the U.S. and Mexican companies." This description is more indicative of an individual creating and performing the customer service function of the petitioner rather than managing the function. 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 lack of other staff to perform the customer service function confirms that the beneficiary is the individual performing the customer service task.

Counsel's assertions on appeal that the beneficiary is a functional manager are without merit. 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, counsel appears confused regarding the type of past experience required of a beneficiary seeking classification as a multinational manager or executive. The beneficiary's experience in a specialized knowledge capacity does not necessarily evidence the management of a particular function. Further, counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those unpublished decisions cited in support of the petitioner's claim. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

The evidence in the record is insufficient to support the petitioner's claim that the beneficiary's foreign position was that of a functional manager. The petitioner's description of the beneficiary's duties for the foreign employer is not comprehensive and again is more indicative of an individual performing the customer service function. The Service cannot conclude from the information submitted that the beneficiary was employed by the foreign entity in an executive or managerial capacity. Counsel has not submitted information on appeal that overcomes the director's determination on this issue.

Beyond the decision of the director, the petitioner also has not established that the beneficiary's proposed position will be an executive or managerial position. The petitioner's description does not sufficiently detail the beneficiary's proposed duties. Further, it is not clear how or why the beneficiary's specialized knowledge position would evolve into a managerial or executive position.

Also beyond the decision of the director, the record does not sufficiently establish that a qualifying relationship exists

between the United States and foreign entity, in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. The petitioner asserts that it is privately held and is owned by four working partners. The petitioner also states that it is a sub chapter S corporation. However, IRS regulations for S corporations do not allow foreign or corporate ownership. Internal Revenue Code § 1361 (a) and (b). 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).

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.