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U.S. Department of Justice

Immigration and Naturalization Service

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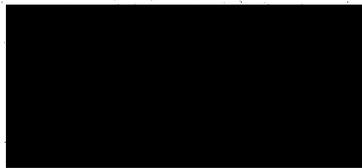
Date: JAN 31 2003

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 a corporation organized in the State of Delaware in September of 1998. The company is headquartered in California and maintains an office in Fairfax, Virginia. It is engaged in soliciting contracts to provide consulting in system software, database application software, and hardware design. It seeks to employ the beneficiary as its business development manager for its human resource initiative. 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 manager. The director determined that the record did not demonstrate that the beneficiary would be employed in a managerial or executive capacity.

On appeal, the petitioner submits a letter in an effort to clarify the beneficiary's position with the petitioner as well as additional evidence.

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. 8 C.F.R. 204.5(j)(5).

The issue in this proceeding is whether the beneficiary has been and will be employed in a managerial or executive capacity 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 clearly requests a finding of eligibility pursuant to the managerial definition of the Act.

The petitioner initially described the beneficiary's responsibilities as follows:

[The beneficiary] will continue to be responsible for sales of the following services of [the petitioner]:

project implementation and consultation, software development, IT infrastructure services, on-shore time and material source supply, and call center solutions. He will oversee overall business management, track emerging markets and technologies, train the sales team of partner companies, and negotiate contracts with vendors. He will also coordinate software application project distribution and direct activities such as business management, relationship management, promotional campaigns, pricing policies, product positioning, and sales projections.

The director requested additional evidence including a more detailed description of the beneficiary's duties including the percentage of time spent in each of the listed duties. The director specifically requested a list of all the employees under the beneficiary's direction and a brief description of job duties for all employees under the beneficiary's supervision. The director further requested the petitioner's organizational chart describing its managerial hierarchy and staffing levels. The director also requested the petitioner's California Form DE-6, Quarterly Wage Reports or wage reports of the appropriate state if the company was not located in California.

In response, the petitioner stated that the beneficiary spent 25 percent of his time on the conceptualization and execution of new business opportunities. This duty included generating sales leads through networking and sales calls, identifying the needs of the customer, negotiating the project contract, and closing the contract. The petitioner also stated that the beneficiary spent 25 percent of his time on account management. This duty included planning the execution of the contract, identifying the project team, managing and solving day-to-day issues, delivering the project to the client's satisfaction, collecting accounts, evaluating the progress of the project and the new business. The petitioner further stated that the beneficiary spent 20 percent of his time strategizing on the increase in market share and market penetration. This duty included attending seminars, meeting customers, translating the knowledge gained to formulate business plans and methodologies, providing input to top management discussing and adopting short and long term strategies. The petitioner stated that the beneficiary spent 10 percent of his time reviewing margins and project issues with management, 10 percent of his time solving employee issues, 5 percent of his time on networking and market development, and 5 percent of his time on participating in the approval and authorization of purchases of office equipment.

The petitioner also provided its California Form DE-6 listing a number of individuals employed by the petitioner. The petitioner provided a list of ten individuals that allegedly reported to the beneficiary. The petitioner further provided its organizational chart for its Sunnyvale, California and Fairfax, Virginia offices.

The chart for the Fairfax, Virginia office revealed four individuals, including the beneficiary with the title business development manager. The chart did not reflect other individuals reporting to the business development managers.

The director noted the discrepancies in the record regarding the beneficiary's management of other individuals. The director determined that the beneficiary's role in the company was not clear and concluded that the record was insufficient to support the petitioner's claim that the beneficiary qualified as a manager and did not support a conclusion that the beneficiary would qualify as an executive.

On appeal, counsel asserts that the petition was denied improperly and submits a letter signed by the petitioner stating that the beneficiary "is solely responsible for the Human Resources initiative of [the petitioner]," and that "the companies in this space are vendors of Human Resources application software, or integrated Human Resources service providers," and that "[the petitioner] provides outsourced Information Technology services and applications to these companies." The letter states further that "[the beneficiary] designed [the petitioner's] service offerings for this initiative, and front-ended the company's marketing efforts which resulted in the signed contracts with . . . two clients last year." The petitioner also states that the beneficiary "handles a team of 26 developers and 6 project leaders for different sub-projects, and also interfaces with clients." The petitioner now submits quarterly wage reports for the first and second quarter of 2002 from the States of Virginia and Massachusetts. The petitioner explains that these reports reflect the individuals that the beneficiary supervises.

Counsel's assertion and the evidence submitted by the petitioner is 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 duties appeared to relate primarily to sales of the petitioner's product and services to other companies. The response to the director's request for evidence confirmed that the beneficiary spent 50 percent of his time generating sales and executing the resulting contract(s). The beneficiary also spent 20 percent of his time on market analysis. The beneficiary spent a minimum amount of time on employee issues (10 percent) and administrative issues (5 percent). The description of the beneficiary's duties reflects duties that involve the day-to-day sales, marketing, and implementation of operational tasks of 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). It does not appear from the description provided that these duties are incidental to the beneficiary's position but

instead appear to be the primary duties of the position. Managers plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. In the case at hand, the petitioner has provided evidence that it is the beneficiary who performs the sales, marketing, and implementation of the contractual operations of the petitioner. The petitioner does not submit evidence on appeal that overcomes the director's determination that these duties are operational tasks rather than managerial tasks.

The petitioner's assertion that the beneficiary handles a team of 26 developers and 6 project leaders is not supported in the record. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The record before the director does not contain independent evidence that the beneficiary supervised anyone. The director specifically requested the petitioner's quarterly wage reports not only from the State of California but also from any state where the company was located to assist in his determination regarding the beneficiary's supervisory responsibilities. The petitioner thus was put on notice of the required evidence and given a reasonable opportunity to provide it for the record. According to case law the subsequently submitted quarterly wage reports from other states will not be considered on appeal, 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).

Of note, even if the quarterly wage reports from the States of Virginia and Massachusetts were considered the information would still not suffice to demonstrate the beneficiary's supervision of other employees at the time the petition was filed. The information submitted relates to the employment of individuals subsequent to the date of the filing of the petition. 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 Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, there is no clear evidence that the beneficiary supervises all or some of the individuals listed on the report. Further, there is no clear evidence that these individuals perform duties that would relieve the beneficiary from performing the operational tasks of the petitioner. Finally, there is no clear evidence that the beneficiary's primary duty is to supervise individuals rather than perform the sales, marketing, design, and execution of the company's contracts.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial capacity or that the beneficiary's duties in the proposed position will be primarily managerial in nature. The descriptions of the beneficiary's job duties are indicative of an individual

performing the operational tasks necessary to conduct the day-to-day business of the enterprise. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary's responsibility includes primarily managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The petitioner has not established that the beneficiary will be employed in a primarily 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.