

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

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



File: WAC 01 117 53188 Office: CALIFORNIA SERVICE CENTER

Date: MAR 12 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:



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**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 (Bureau) 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 Director of the California Service Center denied the employment-based preference visa and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on the ground that the proffered position is neither executive nor managerial.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the director's decision is ambiguous and legally insufficient.

Section 203(b) of the Act, *id.* § 1153(b), 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).

Section 101(a)(44)(A) of the Act, *id.* § 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, *id.* § 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 describes itself as an affiliate of Mobilace Ltd. of Israel that is engaged in exporting steel metal, drums, galvanized steel sheets and computers to Israel. According to the petitioner, the overseas entity currently employs the beneficiary as its president and the petitioner is offering the beneficiary the permanent position of president with the U.S. entity at an annual salary of \$45,000+ per year<sup>1</sup>.

At the time of filing the petition on February 14, 2001, the petitioner claimed to employ two persons and have a gross annual income in excess of \$394,000. Initially, the petitioner described the proffered position as follows:

[The beneficiary's] expertise and knowledge is [sic] required in the U.S. company to ensure the company's goals and objectives are met. In this capacity, his duties will include the implementation of business plans and expansion of business operations and goals. Furthermore, [the beneficiary] will be in charge of negotiations to secure contracts for [the] purchase of products and export of such products to Israel. He will be in charge of directing and formulating financial programs for new or continuing operations and maximizing returns on the company's investment. He will be dealing with professional level individuals such as lawyers, accountants, bankers, etc. [The beneficiary] will review the objectives of the U.S. operations and will set new objectives when and if necessary.

In the initial petition filing, the petitioner did not clearly identify its staffing levels. Although the petitioner stated on the I-140 petition that it employed two persons, it did not mention the names, titles or job descriptions of these two employees. On November 5, 2001, the director requested additional evidence from the petitioner regarding a number of issues. In particular, the director requested a more detailed description of the proffered position, an organizational chart for the petitioner's operations, and a detailed description of its staffing levels.

Counsel responded to the director's request for evidence. Counsel stated the following about the beneficiary's role with the U.S. entity and the petitioner's staffing levels:

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<sup>1</sup> The \$45,000+ annual salary was listed on the I-140 petition whereas the petitioner stated in a letter of support that the beneficiary's salary would be \$70,000 per year. As the petitioner's ability to pay the beneficiary's wage is not at issue in this proceeding, the discrepancy between the two salary figures is not material to the issues that shall be discussed.

[The beneficiary's] duties and responsibilities will include directing the management of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making. Furthermore, [the beneficiary] will be dealing with attorneys, accountants and other company executives and managers on a daily basis. [The beneficiary] will also be in charge of all financial matters and decision making with respect to the U.S. company. In addition to the above, [the beneficiary] will be supervising the Managing Director of the company and four additional staff that will relieve [the beneficiary] from the more ordinary duties. He will not be a "first line supervisor" but rather an executive who has full authority over the overall function of the enterprise. . . . The beneficiary will be directing the Managing Director of the company together with four other employees. These employees include an International Marketing Consultant whose duties include researching market conditions to determine potential sale of metal products, etc.; the Purchasing & Sales Coordinator whose duties include coordinating activities involved with purchasing machinery and other products; the Purchasing Coordinator whose duties include coordinating activities involved with purchasing galvanized drums and conferring with vendors to obtain product information and specifications; Accountant and the Secretary. . . .

The director denied the petition because the petitioner, a two-employee export business, did not have a reasonable need for an executive. The director concluded that the beneficiary has not been and would not be employed in a primarily executive or managerial capacity.

On appeal, counsel states that the director's decision is ambiguous and legally insufficient. Counsel contends that the petition should be remanded to the director for entry of a new decision because the director's language in the denial letter left it ambiguous as to whether the beneficiary's present position for the overseas entity qualifies him for this visa classification.

Counsel states that the beneficiary will "primarily function as a manager and/or executive" and that the director cannot conclude that a company, which buys and sells products, does not need the services of an executive. According to counsel, the law was not intended to limit this visa classification to individuals who manage or run large corporations. Counsel claims that the director's decision was an abuse of discretion, against the weight of the evidence, made without rational explanation, and inconsistent with Bureau policies and precedent decisions.

Counsel is correct in stating that the director's discussion of the evidence, which included language such as "has been and will be employed . . . ." confuses the reader about whether the director was discussing the beneficiary's current employment with the overseas entity in addition to his proposed employment with the U.S. entity. Counsel is also correct in asserting that the director's statement in the denial letter that "this type of business does not require or have a reasonable need for an executive because all they do is buy and sell products" is, by itself, inappropriate and an inadequate basis for denial. However, these two issues do not warrant a remand of the petition to the service center as counsel requests.

First, the denial letter contains only one section entitled "NOT MANAGER/EXECUTIVE IN U.S.," which indicates that only the beneficiary's proposed employment with the petitioner does not qualify as employment in an executive or managerial capacity. Second, the director did not deny the petition solely on the type of the petitioner's operations. A review of the denial letter reveals that the director also denied the petition because the beneficiary would not devote the majority of his time to executive duties. For these reasons, the petition will not be remanded back to the director for entry of a new decision. The AAO shall consider the evidence of record and render a decision on the petitioner's appeal.

Section 101(a)(44)(C) of the Act, *id.* § 1101(a)(44)(C), provides that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Bureau shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner's staffing levels have changed from the time of filing the petition on February 14, 2001. At that time, the petitioner's staffing levels consisted of two persons. According to counsel, the petitioner's staffing levels currently consist of five persons. A petitioner must establish eligibility at the time of filing. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The Bureau cannot consider facts that come into being subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I & N Dec. 114 (BIA 1981). Thus, this decision shall discuss only the petitioner's staffing levels at the time of filing the petition.

Counsel states on appeal that the beneficiary will function primarily as an executive and/or a manager. In his response to

the director's request for evidence, counsel stated that the beneficiary would direct the management of the organization, establish the goals and policies of the organization; exercise wide latitude in discretionary decision-making, and supervise subordinate personnel. However, it is incumbent on the petitioner to specify whether the proffered position is either in an executive or managerial capacity. A petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial in nature. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. 8 C.F.R. § 204.5(j)(5). (Emphasis added.)

Regarding the alleged executive nature of the proffered position, the petitioner's description of the proffered position does not contain the level of detail needed to show that the beneficiary would perform the high level responsibilities specified in the definition of executive capacity. The duties of the proffered position are described in broad terms, and are merely a reiteration of the statutory definition.

For example, counsel states on appeal that the beneficiary would establish and implement global business strategies, which include "establishing the necessary infrastructure to drive these strategies, so that a more predictable demand for the company's products and services can be maintained worldwide." However, neither counsel nor the petitioner identifies the types of duties associated with this rather broad and somewhat vague job responsibility. The Bureau is not persuaded that the activity of establishing an infrastructure is a high level responsibility of an executive. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). Here, the beneficiary's job description does not contain the level of specificity required to establish that the proffered position is in an executive capacity. Furthermore, while counsel implies that the proffered position is in an executive capacity because the beneficiary would be required to liaise with attorneys, accountants and other company executives, these duties are not solely within the domain of someone who works primarily as an executive.

Regarding the alleged managerial nature of the proffered position, there is insufficient evidence to show that the beneficiary would be employed in a managerial capacity. Counsel claims that the beneficiary would direct the petitioner's operations through other subordinate employees. Although the petitioner listed on the petition that it employed two individuals at the time of filing the petition, the petitioner did not identify these individuals by name, title or job

description. The petitioner cannot expect the Bureau to find that the reasonable needs of its organization in light of its overall purpose and stage of development are satisfied by its staffing levels. The petitioner failed to specify the names or specific duties of the persons who would be supervised by the beneficiary; therefore, simply 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). While counsel's response to the director's November 5, 2001 request for evidence included the titles and brief job duties of the petitioner's current employees, neither counsel nor the petitioner supplied the same information about the two individuals that the petitioner employed at the time of filing the petition. Based upon the evidence available to Bureau at this time, there is insufficient evidence that the beneficiary would control, direct, hire and fire subordinate employees.

Similarly, there is insufficient evidence to conclude that the beneficiary would manage an essential function. Both counsel and the petitioner merely state that the beneficiary would be responsible for directing the petitioner's operations. Neither party identifies the alleged function that the beneficiary would manage, or explain why such function is essential to the petitioner's operations. The evidence of record fails to establish that the beneficiary merits classification as a multinational executive or manager.

Beyond the decision of the director, the petitioner fails to establish the existence of a qualifying relationship between the petitioner and the overseas entity. The petitioner claims to be affiliated with Mobilace Ltd. of Israel because the beneficiary owns a majority of the outstanding shares of stock in each company.

Pursuant to 8 C.F.R. § 204.5(j)(2), *affiliate* means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; \* \* \*

A review of the petitioner's stock certificates reveals that the beneficiary owns 51% (5,100) of the petitioner's shares of stock, and Anat Halifa owns the remaining 49% (4,900) of the petitioner's shares of stock. The petitioner did not submit any stock certificates for the foreign entity; however, it did submit a *Memorandum of Association of a Company Limited by Shares (Memorandum)* and a letter from the overseas entity's accountant. According to the *Memorandum*, the beneficiary and Ori Halifa own an

equal number of shares of stock, which are 301 NIS management shares and 301 regular shares. The overseas entity's accountant claims that the beneficiary is the "majority shareholder of the company."

Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (Comm. 1988); See also, *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International, supra*, at 595.

The petitioner's evidence regarding the ownership of the foreign entity lacks any supporting documentary proof. The assertion of the overseas entity's accountant is insufficient, and the Bureau requires more evidence of ownership than a *Memorandum*. Again, simply 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, supra*. Even if the Bureau found the evidence in the record to be acceptable proof of the overseas entity's ownership, an affiliate relationship would not exist between the two entities because there is no evidence that the two companies are owned and controlled by the same individual or by the same group of individuals. As the appeal is dismissed on another ground, this issue will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, *id.* § 1361. Here, the petitioner has not met that burden. The beneficiary does not merit classification for an employment-based preference visa as a multinational executive or manager.

**ORDER:** The appeal is dismissed. The petition is denied.