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

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: WAC 00 258 54633

Office: CALIFORNIA SERVICE CENTER

Date:

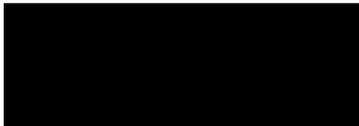
MAR 12 2003

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)

ON BEHALF OF PETITIONER:



Identifying data deleted to
prevent unwarranted
invasion of personal privacy

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 affirmed his decision in a subsequent motion to reconsider. 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 vice president of systems. 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, copies of evidence already included in the record, and a declaration from the petitioner's general manager. Counsel states, in part, that the proffered position is both executive and managerial because the beneficiary has responsibility for a function of the petitioner's operations.

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 Fabricacion Artesanal de Vidrio, S.A. de C.V. (Farvisa) of Mexico. According to the petitioner, it sells electrical lamps fashioned in the traditional Tiffany style that are manufactured by its affiliate, Farvisa, in Mexico. A review of the record reveals that the petitioner currently employs the beneficiary in the proffered position in L-1A nonimmigrant status and it is offering the beneficiary a permanent position at an annual salary of \$30,000 per year¹.

At the time of filing the petition, the petitioner stated that it employed 10 persons in the United States and had a gross annual income in excess of \$6,000,000. In the I-140 petition filing, the petitioner described the proffered position in an ETA Form 750 and an accompanying letter of support as follows:

ETA 750

Vice-president in charge of Industrial Engineering/Systems. Establish computer models/programs for manufacturing processes. Establish computer controls for computerized manufacturing; establish administrative controls for computerized manufacturing systems. Administer and control manufacturing plan in Mexico via computerized programs.

Accompanying Letter of Support

[In the capacity of vice president of systems], he will implement, install and oversee the computerization and administration of our manufacturing process in Mexico. He will work out of our Chula Vista office which serves

¹ The \$30,000 annual salary was listed on the I-140 petition. On appeal, the petitioner's general manager states that the beneficiary's salary has been raised to \$47,000 per year. Although the director cited the beneficiary's low salary as an indicator that the proffered position was not in an executive or managerial capacity, such an observation is immaterial to the executive or managerial nature of the proffered position. Thus, the beneficiary's salary shall not be discussed further.

as our headquarters for all administrative functions. [The beneficiary] will supervise approximately 15 to 20 employees. . . . [The petitioner] requires [the beneficiary] to continue on a permanent basis his involvement with the engineering set-up on the computer system to coordinate with our Mexican work force and to implement the computerization of our manufacturing process in Mexico. This work has been centralized in our main office. In addition, [the beneficiary's] cultural background has proven invaluable in directing our employees in Mexico and maintaining a solid line of communications [sic] with them via computer and in person when required. Petitioner has also recently opened a plant in China and [the beneficiary] will eventually be called upon to assist in the development of a[n] engineering software program for this new assembly plant.

On January 13, 2001, the director requested additional evidence from the petitioner regarding a number of issues. In particular, the director requested an organizational chart for the petitioner's operations that contained, among other items, the job duties, educational levels, and annual salaries/wages for all employees under the beneficiary's supervision. In response, the petitioner submitted a combined organizational chart for the United States, Mexico and China operations. According to the organizational chart, the proffered position had direct supervisory authority over a plant manager. The petitioner did not submit the job duties of this manager as requested by the director.

The director initially denied the petition on November 1, 2001, finding that because the beneficiary would not supervise employees within the petitioner's operations, the beneficiary would necessarily perform the day-to-day duties of the petitioner's business such as developing software. Counsel submitted a motion to reconsider, stating that the director failed to recognize that the beneficiary would be working in an executive or managerial capacity because he would be responsible for a function of the petitioner. Counsel stated that neither the statute nor the regulations specifies that the employees supervised by the beneficiary must work for the United States entity. Counsel also asserted that the proffered position did supervise a plant manager who worked in the United States and counsel submitted a new organizational chart to reflect some changes to the organizational hierarchy. According to this organizational chart, the proffered position had direct supervisory authority over five managers, two of whom worked in the United States. Finally, counsel stated that the beneficiary would be responsible for developing software systems, which is the organizational function managed and directed by the beneficiary for both the overseas the United States entities.

The director was not persuaded by counsel's assertions on motion and he affirmed his prior decision to deny the petition for the reasons stated in the initial denial letter. On appeal, counsel reiterates many of the same statements he made on motion, in addition to several new assertions.

Regarding whether the beneficiary is directing and managing a function, counsel states that "[I]f no other employee is directly supervised, the beneficiary must, of necessity, be the only one performing the function." Counsel asserts that, if a beneficiary cannot directly perform the function that he manages or directs, the regulatory language is useless. According to counsel, the beneficiary clearly functions at a senior level with respect to the function he manages as well as within the organizational hierarchy. Counsel notes that the beneficiary has developed the computer programs for the petitioner's manufacturing processes, but maintains that the beneficiary also oversees and manages the use of these programs by other personnel. In support of his assertions, counsel cites numerous unpublished decisions of the AAO and the Immigration and Naturalization Service's Commissioner, which counsel refers to as "precedent decisions of the INS."

In addition, the petitioner's general manager submits a declaration in support of the appeal. According to the general manager, although the beneficiary devised the petitioner's software systems, he now supervises various managers that "are tied into the system and, in effect, running the entire production facility in Mexico." The general manager further asserts that the beneficiary is in charge of installing a similar computer system in the new production facility in China, that he will be in charge of the manufacturing at that facility, and that the beneficiary's executive and managerial duties absorb 70 percent of the beneficiary's time.

The issue to discuss is whether the proffered position is in an executive or managerial capacity. The petitioner claims that the proffered position is in an executive capacity because the beneficiary directs the management of the manufacturing process in Mexico. The petitioner also claims that the proffered position is a "functional manager" position because the beneficiary manages an essential function - the manufacturing process in Mexico via the computer programs that the beneficiary created. Furthermore, the petitioner asserts that the beneficiary is an "activity manager" because he supervises and manages other managerial employees who are not first-line nonprofessional employees.

Regarding the definition of executive capacity, the petitioner's general manager states that executive/managerial duties absorb 70 percent of the beneficiary's time; however, the petitioner fails to list the duties that he deems to be activities of an executive, and which allegedly absorb the primary amount of the beneficiary's

time. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive in nature, otherwise meeting the definition 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). Counsel states on appeal that the beneficiary qualifies as an executive because of his senior position, his responsibility for and discretionary authority over the production process, and his presence on the policy making team of the petitioner. However, counsel merely lists generalized responsibilities of the beneficiary; there is no evidence that the beneficiary primarily performs these duties. Nor is there any evidence that the beneficiary directs the management of a function. 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). Based upon the evidence before the Bureau at this time, the petitioner fails to adequately delineate between the beneficiary's executive duties and those nonexecutive duties that the petitioner concedes the beneficiary performs. Accordingly, there is insufficient evidence that beneficiary would primarily perform the high level responsibilities specified in the definition of executive capacity.

Regarding the managerial nature of the proffered position, the petitioner provides a generalized job description, which indicates that the beneficiary both develops the software programs and manages their use in the manufacturing process. The petitioner also submits an organizational chart, which indicates that the beneficiary has supervisory authority over five individuals with managerial titles.

The proffered position is not a "functional manager" position or an "activity manager" position. The petitioner fails to quantify the amount of time that the beneficiary spends on developing and engineering software programs versus the amount of time he spends managing the manufacturing process through these programs. This failure of documentation is important because one of the beneficiary's main responsibilities - developing software - does not fall directly under traditional managerial duties. *IKEA US, Inc., v. U.S. Dept. of Justice I.N.S.*, 48 F. Supp. 2d 22 (D.D.C. 1999), *aff'd*, 1999 WL 825420 (D.C. Cir. 1999). Thus, the Bureau cannot conclude that the beneficiary primarily manages an essential function of the petitioner.

Additionally, counsel erroneously asserts that the Bureau must consider the number of individuals that a beneficiary supervises in the overseas entity when determining whether the beneficiary supervises and controls the work of managerial, supervisory or professional employees. The statutory definitions of both executive and managerial capacity refer to an assignment within an organization in which the employee either manages the organization or a function thereof, or directs the management of

the organization or a function. Section 101(a)(28) of the Act defines "organization" as follows:

The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

The statutory definition of an organization does not reasonably include a foreign corporation that is an entity separate and distinct from the petitioning organization. Accordingly, the beneficiary's claimed managerial duties that relate to the employees of the foreign corporation may not be considered for purposes of this immigrant visa petition. Regarding the two employees that the beneficiary allegedly manages in the United States, the petitioner does not present their job descriptions or list these employees' job duties. The Bureau, therefore, cannot determine whether these individuals are managerial employees by virtue of their job duties, not by their job titles. 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). Accordingly, the proffered position is not in a managerial capacity because there is insufficient evidence that the beneficiary manages a function of the petitioner through managerial, supervisory or professional employees.

Finally, counsel cites to several unpublished AAO decisions and decisions made by the Immigration and Nationalization Service's Commissioner and states that the director ignored these "precedent decisions of the INS." The cases cited by counsel, however, are not precedent decisions; they are unpublished decisions. By designating a decision as a precedent, the Commissioner can bind all to follow the reasoning of the decision. 8 C.F.R. § 103.3(c). However, unpublished decisions are not similarly binding.

For the reasons stated above, the beneficiary does not merit classification for an employment-based preference visa as a multinational executive or manager. 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.

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