

BH

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

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

**PUBLIC COPY**



MAR 24 2003

File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 clearly 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 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Illinois organization incorporated in August 1994. It is engaged in software development for banking and financial services. It seeks to employ the beneficiary as its senior project manager of systems and programming and 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 record did not demonstrate that the beneficiary would be acting primarily in an executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Bureau misconstrued the evidence submitted and that the beneficiary's duties are managerial 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.

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).

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 will be performing managerial duties for the United States enterprise. The petitioner clearly states that the beneficiary should be considered under the definition of managerial capacity rather than the definition of executive capacity.

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 director based his decision on the issue of the petitioner's proposed employment for the beneficiary. The director made his determination without requesting further evidence on this issue. 8 C.F.R. § 204.5(j)(5) requires the prospective employer in the United States to 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. The statement must clearly describe the duties to be performed by the alien. The required initial evidence thus, is a statement that clearly describes the beneficiary's intended duties. In this case, the description of the beneficiary's proposed duties for the petitioner is found in the petitioner's written letter in support of this petition. The petitioner describes the beneficiary's duties and responsibilities as follows:

[The beneficiary] effective April 27, 2001 is overseeing the development and production activities of onsite and remote software development teams with regard to our Company's introduction in the United States of e-business 'web development, Internet Technologies'. [sic]. [The beneficiary] is responsible for the overall development of this project including coordinating the software development process through its development lifecycle; ensuring project documentation; developing the budget and approving appropriate software purchase and other project expenditures; oversight of quality assurance through subordinate supervisors to establish appropriate

criteria; and most importantly to motivate and guide project teams through the developmental lifecycle. He will also liaison with Company Business Managers and clients to ensure that the finished products serves our clients e-business needs.

The petitioner noted that the beneficiary would manage four subordinate supervisors who were responsible for supervising forty employees. The petitioner indicated that the four supervisors and the forty employees were located overseas in the petitioner's branch office. The petitioner also stated that the beneficiary was responsible for the direct supervision of three employees in the United States. The petitioner further stated that the beneficiary would have "complete responsibility for assigning and directing work, appraising performances, planning long term tasks and direction of the project, and oversight of all additional hiring of staff (dismissals if necessary) and training of employees."

The beneficiary's proposed position in the United States is for an individual responsible for introducing the petitioner's e-business including its web development and internet technologies to the United States market. The beneficiary's responsibility in this regard appears to be supervising "the development and production activities of onsite and remote software development teams" to implement this project.

The initial question is whether the beneficiary's supervision of three individuals in the United States requires a conclusion that the beneficiary is supervising professional employees. In this regard the Bureau has limited information regarding the three employees under the beneficiary's supervision. The petitioner describes two of these individuals as individuals who will work on software development and one who will have project management and marketing responsibilities. It is not possible to discern from this limited information if these three employees hold professional positions. This particular information is of primary importance as the managerial definition specifically excludes a first-line supervisor from being considered a "manager" unless the first-line supervisor supervises professional employees. If the Bureau considers only the beneficiary's supervision of the three employees located in the United States the Bureau must conclude that the beneficiary is a first-line supervisor of non-professional, non-managerial, and non-supervisory employees. The petitioner has not provided initial evidence in the record contrary to this conclusion.

The second question is whether the beneficiary is managing an essential function of the petitioner. It is also not possible to glean from the brief description of the project and the beneficiary's related duties whether the beneficiary is primarily responsible for managing the project, primarily performing marketing duties for the project, or primarily supervising

employees in the implementation of the project. However, counsel on appeal directs the Bureau to focus on the beneficiary's supervisory duties and quotes from the petitioner's initial statement that "[the beneficiary's] supervisory duties are of primary importance" in support of his direction. In quoting this statement on appeal, counsel asserts that the Bureau arbitrarily ignored the beneficiary's supervisory duties over individuals located overseas.

Counsel is correct that the director did not address the petitioner's presumption that the Bureau would or should consider the beneficiary's duties relating to overseas employees. The AAO recognizes that this is an important consideration in this day of e-commerce and telecommuting and that it is possible to supervise employees in remote locations. However, it is imperative that the petitioner establish by independent documentary evidence that the remote location is legally linked to the petitioner and that the beneficiary is actually the individual supervising and controlling supervisory, professional, or managerial employees at the overseas location.

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 directs the management of the organization. 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. The petitioner, thus, must establish that the United States entity and the foreign companies are either permanently or temporarily associated through ownership, contract, or other legal means. In this regard, the petitioner has provided a translation of a certificate confirming that it is "included in the unified log of accredited representative offices of foreign corporations in the Russian Federation." The petitioner has provided evidence that the office located in Novosibirsk, Russia is its branch office. The Bureau may, thus, consider the beneficiary's claimed supervision of employees located overseas. However, the petitioner must still establish that the beneficiary actually "supervises and controls the work of other supervisory, professional, or managerial employees" and that this is the beneficiary's primary duty.

The petitioner has provided an organizational chart of its Russian branch office that depicts the beneficiary as the senior project manager over four departments with the headings web-development department, client-server development department, java development department, and quality assurance department. The organizational

chart shows seven to eleven employees in each of the departments. The director of the Russian branch of the petitioner states that the Russian branch employs a total of 126 individuals in nine departments in the Novosibirsk office and two departments in the Moscow office. The petitioner has not provided sufficient independent evidence in support of its branch office's employment of the individuals under the beneficiary's claimed supervision. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The Bureau often requires independent information in the form of reports to the United States government as evidence of a petitioner's number and type of employees. The petitioner in this instance did not provide similar independent information that it employs individuals overseas. The petitioner also did not provide a detailed description of the duties of the overseas positions subordinate to the beneficiary. Finally, the petitioner has not explained and provided independent evidence demonstrating that the beneficiary is the individual responsible for the supervision of the employees located overseas. An organizational chart along with an assertion that the beneficiary supervises these individuals is not sufficient.

The AAO is concerned that, in this case, the petitioner's desire for the beneficiary to remain in the United States is to promote and actually market the petitioner's services in the United States. This would indicate that the beneficiary was performing an essential function of the petitioner rather than managing an essential function and, thus, the beneficiary would not qualify as a manager. 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).

Of further note, even if the petitioner had initially established that the beneficiary actually supervised the individuals in the overseas location, the petitioner must still establish that the beneficiary meets the criteria of the remaining elements of the definition of managerial capacity. Further, the petitioner must establish that these duties are the beneficiary's primary duties in relation to the organization.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary does not effectively demonstrate that the beneficiary

will have managerial control and authority over a function, department, subdivision or component of the company. The Bureau 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 will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, examination of the record reveals that the petitioner has not established that the beneficiary's duties for the employer's branch office prior to entering the United States as a non-immigrant were duties of a managerial or executive nature. The beneficiary's duties are not sufficiently detailed. The initial petition recited the beneficiary's experience but did not focus on the duties and responsibilities of the position held by the beneficiary before entering the United States.

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.

