

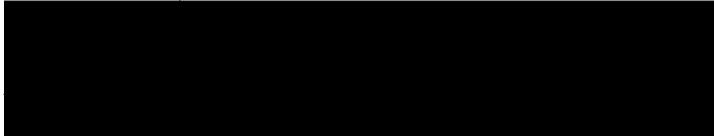
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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



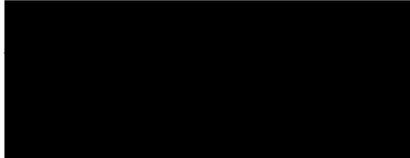
File: [Redacted] Office: NEBRASKA SERVICE CENTER Date:

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

MAR 24 2003

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:



PUBLIC COPY

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 employment-based visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal. The matter is now before the AAO on a motion to re-open and reconsider. The motion will be granted. The petition will be denied.

The petitioner is a corporation organized in the State of Nebraska in 1992. It is engaged in the international import and export of consumer electronics and has offices in the United States and in Russia. It seeks to employ the beneficiary as its vice-president for internet sales. Accordingly, the petitioner 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 established that the beneficiary had been employed by the foreign entity in a managerial capacity and that the beneficiary is not currently and would not continue to be employed in a primarily managerial capacity. The AAO found that the petitioner had submitted sufficient information to overcome the director's decision regarding the beneficiary's employment in a managerial capacity for the foreign entity. The AAO affirmed the director's decision on the issue of the beneficiary's managerial capacity for the United States petitioner. The AAO also determined that the petition could not be approved because the petitioner had failed to establish that the beneficiary would enter the United States to render services to the same employer or to a subsidiary or affiliate of the foreign entity.

On motion, counsel for the petitioner requests that the proceeding be re-opened and the AAO's dismissal reconsidered on the basis of two reasons. Counsel asserts that the beneficiary's "managerial duties" warrant approval based on the additional factual evidence provided. Counsel asserts further that the AAO erred as a matter of law by determining that a United States parent company cannot petition for employees of its foreign subsidiary.

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.

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 first issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties 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.

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 stated that the beneficiary "participates in lease and other contract-related negotiations, formulates pricing policies, reviews market trends on the Internet, oversees inventory, employment matters, and day-to-day retail operations" of the business. The petitioner also stated that the beneficiary "consults with the President of [the petitioner] on such matters as product mix, pricing, and company-wide contractual arrangements." The petitioner specifically noted that the beneficiary did not "currently manage any personnel" but "manage[d] an absolutely essential function of our company, one which is necessary if we are to be able to generate any internet sales, which is 80% of our business."

In response to the director's request for evidence the petitioner clarified that "while [the beneficiary] does not supervise any personnel in the U.S. at this time (although it is anticipated he will as we add employees), he does supervise employees in Russia." The petitioner also included its organizational chart depicting a president, the beneficiary as the internet sales vice-president with four groups of six employees each reporting to the beneficiary. The petitioner indicated that the employees reporting to the beneficiary were located in Russia. The organizational chart depicted other employees who reported to the president of the company but were outside the beneficiary's chain of command.

On appeal, the petitioner indicated that the president has "delegated the authority for the day-to-day administration of all functions and activities of the Internet Sales Department" as well as the functioning and activities of the marketing and contractors department to the beneficiary. The petitioner indicated that the beneficiary had the authority to decide what products are suitable

for sale on the internet, set prices and price margins, control inventory levels, allocate product lines between the four different web sites, set sales goals and performance criteria, and determine general marketing strategy for internet sales. The petitioner stated that, in addition, the beneficiary oversees four sales groups located in Russia and that he has the authority to make personnel decisions regarding all hierarchy levels of all of the four operations.

The AAO found that the petitioner had not clearly stated the beneficiary's duties. The AAO further found that the petitioner had not provided any insight into the necessity of the beneficiary's services in the United States if the beneficiary's subordinate staff were employed by the foreign entity.

On motion, the petitioner states that in addition to the beneficiary's management of the website groups in Russia, the beneficiary has managerial responsibilities in the United States. The petitioner indicates that the beneficiary negotiates with United States suppliers and advertisers, makes decisions on policy and budget concerning products the company buys, makes pricing determinations, and negotiates and purchases inventory. The petitioner also indicates that the beneficiary manages the marketing director and makes decisions on website maintenance performed by other employees at the company's server site in California. Counsel asserts that the beneficiary is a functional manager who also manages staff both in the United States and in Russia.

Counsel's assertion is not persuasive. The addition of departments and personnel located in the United States to the beneficiary's supervisory responsibilities some time after the petition was filed does not contribute to a claim of eligibility for this visa classification. 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 Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Our review of the previous decisions will not consider the beneficiary's new responsibilities regarding duties supervising United States personnel and departments.

In addition, neither counsel nor the petitioner has provided sufficient information to demonstrate that the beneficiary is a functional manager. As previously determined by the AAO, the petitioner has not provided a comprehensive description of the beneficiary's day-to-day duties. The petitioner indicates that generally the beneficiary participates in or actually negotiates contracts, formulates pricing policies, reviews market trends, controls inventory levels, allocates product lines between the four different web sites, sets sales goals and performance criteria, and determines general marketing strategy for internet sales. It is not clear from this description whether the

beneficiary is performing managerial functions with respect to these activities or whether the beneficiary is actually performing the activities. 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 petitioner has not provided evidence of other employees that perform these basic tasks thereby relieving the beneficiary from performing these activities. The record contains insufficient information to demonstrate that the beneficiary will be relieved of primarily performing non-qualifying duties in the course of his everyday activities. The petitioner has not met its burden of proof in demonstrating that the beneficiary plans, organizes, directs, and controls the organization's essential function(s) and work through other employees rather than the beneficiary, himself, primarily performing the organization's necessary operational tasks.

Further, neither counsel nor the petitioner has provided sufficient evidence regarding the beneficiary's purported supervisory duties of individuals employed by the petitioner's subsidiary in Russia. The AAO recognizes that it may be possible to supervise employees in remote locations in this day of e-commerce and telecommuting. 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 and that the companies share common concerns. The petitioner in this instance has provided sufficient information that it and its Russian subsidiary are interrelated to such a degree that the AAO could consider the beneficiary's claimed supervision of employees located overseas. However, the petitioner has not established 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 not provided sufficient independent evidence in support of its subsidiary'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). Independent information in the form of reports to the United States government as evidence of a petitioner's number and type of employees is often required to establish that the petitioner actually employs the number of individuals it claims. The petitioner in this instance has not provided sufficient independent information of the individuals employed overseas. The petitioner also has not provided detailed descriptions of the duties of the overseas positions subordinate to the beneficiary. It appears these individuals may be computer programmers but specifics regarding their daily duties have not been submitted. Finally, the petitioner has not 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.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are general and at most indicate that a majority of his duties relate to the performance of basic operational tasks for the petitioner. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service 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 at the time of filing the petition had been or will be employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with a foreign entity.

The AAO has traditionally interpreted the language of the statute to limit eligibility of this classification to 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. In this case, the

beneficiary previously worked for a foreign subsidiary of a United States company. The statute can be interpreted to find that the United States petitioner is the firm, corporation, or other legal entity referred to in this first clause. Such an interpretation results in a finding the petitioner has satisfied the first clause of the AAO's traditional interpretation. The beneficiary also came to the United States (from the overseas foreign subsidiary) to work for the United States company thereby satisfying the second clause of the above interpretation. Accordingly, the previous decision will be withdrawn as it relates to the issue of the claimed qualifying relationship.

The AAO's decision regarding the petitioner's qualifying relationship with the beneficiary's overseas employer will be withdrawn. The AAO's decision regarding the lack of the evidence demonstrating the beneficiary's managerial or executive capacity will be affirmed.

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 Administrative Appeals Office's decision of February 13, 2001 is affirmed as it relates to the issue of the beneficiary's managerial or executive capacity and is withdrawn as it relates to the issue of qualifying relationship. The petition is denied.