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

[redacted]

File: WAC 01 282 59871 Office: CALIFORNIA SERVICE CENTER Date: MAR 28 2003

IN RE: Petitioner:
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:

[redacted]

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 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 management information systems director (MISD). 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 not in an executive or managerial capacity.

On appeal, counsel submits evidence that the director requested in a prior Request for Evidence (RFE). Counsel states, in part, that the beneficiary functions at a senior level within the organization and exercises discretion over the day-to-day operations of the information systems division.

Section 203(b) of the Act, 8 U.S.C. § 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must

clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner describes itself as a subsidiary within the [redacted] group along with the overseas entity, [redacted] S.A. of Mexico. The petitioner states that the [redacted] group manufactures furniture for sale in retail stores, and employs 150 individuals.

According to the petitioner, it currently employs the beneficiary in the proffered position in L-1A nonimmigrant status and it is seeking to permanently employ him at a salary of $40,000 per year.

The issue to be discussed in this proceeding is whether the proffered position is in an executive or managerial 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.

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.

At the time of filing the petition on August 30, 2001, the petitioner described the beneficiary's duties in the proffered position, in part, as follows:

> Since arriving in the U.S. [the beneficiary] has been responsible for managing and directing all computer development and installation activities at [the petitioner]. This includes communicating the technological and development direction of [the petitioner] to our international office on a regular basis. [The beneficiary] routinely meets with various technical specialists to review current MIS policies and procedures and [to] develop appropriate corporate standards. In addition, he meets with other Managing Directors to ensure that our corporate philosophy in the MIS area is understood and being delivered accurately. . . .

On January 31, 2002, the director requested additional evidence from the petitioner. The evidence that the director requested included, but was not limited to: a more detailed description of the proffered position to include the percentage of time spent in each of the listed duties; an organizational chart, which showed all of the employees who would be under the beneficiary's supervision by name and job title; a brief description of the job duties, educational level, and annual salaries/wages for the employees who would be under the beneficiary's supervision; and copies of Form DE-6, Quarterly Wage Report, for the last four quarters.

The petitioner did not submit any of the evidence noted above when responding to the director's request for evidence (RFE). The

director denied the petition because, without evidence of the petitioner's staffing levels, he could not determine whether the beneficiary would be employed in an executive or managerial capacity.

On appeal, counsel submits evidence that the director had previously requested but which the petitioner failed to submit in response to the RFE.

Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. 103.2(b)(8).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the Administrative Appeals Office will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The petitioner did not describe the duties associated with the proffered position, or provide information about the percentage of time that the beneficiary would spend on technical information systems (MIS) issues versus the amount of time he would spend managing the MIS process. Where a petitioner fails to document what proportion of a beneficiary's duties would be managerial/executive functions and what proportion would be nonmanagerial/nonexecutive functions, the petitioner fails to establish that the position fits the definition of managerial or executive capacity. *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).

Furthermore, the petitioner states that the beneficiary "has been responsible for managing and directing all computer development and installation activities at [the petitioner]." The petitioner fails to specify the activities associated with this broad job responsibility, and without more specific information regarding how and at what frequency the stated duties are performed, the petitioner's job description of the proffered position merely reiterates the definition of managerial capacity. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103,(E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). It is not possible to determine from reviewing the record whether the beneficiary would perform managerial or executive duties with respect to the duties generally described in the petition or would be actually performing the duties. 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 Bureau notes that the petitioner does not describe the job responsibilities of the five individuals who would hold positions subordinate to the beneficiary as its company president. Absent a listing of the employees' specific duties, the petitioner has not established that the beneficiary would serve as more than a first line supervisor as required by the regulations. *See Republic of Transkei*, 923 F. 2d 175, 177 (D.C. Cir. 1991). Based upon evidence before the Administrative Appeals Office at the present time, the proffered position is not in an executive or 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. The petitioner has not met its burden of establishing that the beneficiary merits classification for an employment-based preference visa as a multinational executive or manager.

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