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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 00 110 52074 Office: CALIFORNIA SERVICE CENTER Date:

MAY 14 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:



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 preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was incorporated in 1994 in the State of California and is claimed to be a subsidiary of [REDACTED] located in Taiwan. The petitioner is engaged in the business of "chemicals and related products." It seeks to employ the beneficiary as the its vice president. 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 would be employed in a managerial or executive capacity.

On appeal, counsel submits a brief refuting the director's findings. Additional evidence is also submitted in support of the claims made on appeal.

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, which 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.

The issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

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.

In the initial filing, the petitioner stated that the beneficiary's prospective duties would be "[t]o assist the president to oversee [sic] and direct company operation and activities."

On September 22, 2000, the director instructed the petitioner to submit, in part, its organizational chart identifying the beneficiary's position, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of all of the employees under the beneficiary's supervision. The petitioner was asked to provide brief job descriptions, educational levels, and salaries and wages of the beneficiary's subordinates.

In response to the above request, the petitioner submitted an organizational chart displaying five employees. The beneficiary's position is directly under the president who is at the top of the petitioner's hierarchy. The remaining three positions are secretary, accounting clerk, and sales representative, all of whom are illustrated in the chart as the

beneficiary's direct subordinates. Neither the secretary nor sales representative has degrees that are higher than the high school level. The petitioner's accounting clerk has an "associate artist degree," which also does not reach the level of a baccalaureate degree.

The petitioner provided the following description of the beneficiary's duties in the United States:

- To manage and coordinate activities of department to obtain optimum efficiency and economy of operations and maximize profits, as well as to effect operational efficiency and economy.
- To plan and develop organization policies and goals, and to implement goals through subordinates, as well as to see to that the policies conform with the policies of the parent company.
- To survey, research, prepare and analyze budgets to identify areas in which reductions or increments should be made.
- To confer with employees and to review the employee's performance to determine hire and fire of employee is necessary.
- To prepare and report company progress to the parent company.

The director denied the petition, concluding that the petitioner's description of the beneficiary's duties is "not sufficient to warrant a finding of managerial or executive job duties."

On appeal, counsel claims that it is the petitioner's policy "to observe job descriptions of each position in the company according to guidelines given by governmental agency." The AAO interprets counsel's claim as an assertion that the beneficiary's duties fit the statutory definition of "managerial capacity." However, 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).

Counsel asserts further that the beneficiary has been performing the duties of a general manager. To support this assertion, the petitioner provides a timetable with a breakdown of time the beneficiary spends performing his duties. However, the petitioner failed to provide this breakdown of time when the director issued a request for additional evidence. Where a petitioner was put on notice of the required evidence, and given a reasonable opportunity to provide it for the record before the denial, the Bureau will not consider evidence submitted on appeal for any purpose. Rather, the Bureau will adjudicate the appeal based on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit evidence requested in the Bureau's notice, the newly submitted breakdown of the beneficiary's duties will not be considered in this proceeding. The petitioner also submitted the following additional evidence in support of the claim that the beneficiary was acting in the capacity of a general manager:

- a new office lease agreement for 1999;
- the beneficiary's name tags from participation in a trade show;
- the petitioner's phone bills;
- newspaper solicitations for additional personnel;
- the foreign entity's weekly sales reports;
- the promotional materials describing the petitioner's products, produced by the beneficiary;
- the petitioner's business plan; and
- the petitioner's income tax return for the year 2000.

None of the above submissions support the claim that the beneficiary was acting in a managerial capacity. The office lease, signed by the beneficiary, his name tags indicating trade show participation, the business plan, and the promotional material indicate that the beneficiary has a great degree of input and discretionary authority over the petitioner's daily operations. However, authority alone is not sufficient to establish that the beneficiary qualifies under the statutory definition of "manager." Counsel's assertion to the contrary is a clear indication of her misunderstanding of the difference

between the statutory definition of "managerial capacity" and the meaning of this term in the ordinary business context. While the latter allows great leeway in what the manager's tasks may include, the manager, for immigration purposes, must primarily perform managerial duties, not the petitioner's day-to-day operational tasks. In the instant case, the beneficiary's duties include surveying, researching, and preparing budgets, as well as preparing progress reports to be sent to the parent organization. Although these duties are attributed to a professional, they cannot be deemed to be of a managerial nature. Furthermore, since the petitioner failed to provide a percentage breakdown of time spent performing these duties, there is no clear indication that the beneficiary's time is primarily spent performing managerial tasks, rather than the tasks of a staff professional. It is noted that 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).

In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The only description of the beneficiary's job duties indicates that a significant portion of the beneficiary's duties requires him to survey, research, and prepare progress reports for the parent organization. These duties are not managerial. The remaining duties listed are, as the director noted, too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis. The summary of the beneficiary's duties does not include a description of any subordinate positions that would perform the essential functions of the petitioner's business or the beneficiary's duties. Upon review, the description of the beneficiary's job duties lead the Bureau to conclude that the beneficiary is performing as a professional or "staff officer," not as a manager or executive.

Further, the description of the beneficiary's proposed duties does not persuasively demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties.

Section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to architects, engineers, lawyers,

physicians, surgeons, and teacher of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. § 204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. As previously noted, the beneficiary's subordinates do not have the education or job duties to be considered professional or supervisory. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the record lacks sufficient evidence to determine that the petitioning enterprise has a qualifying relationship with the claimed parent company. The petitioner has submitted stock certificates and a wire transfer indicating that the foreign parent organization owns 40,000 shares of the petitioner's stock, which is claimed to be more than 50% of the issued shares. However, the petitioner also submitted its year 2000 income tax return, which indicates that [REDACTED] the petitioner's president, owns 67% of the petitioner's stock. This conflicting information leads the Bureau to conclude that the petitioner has failed to establish that it maintains a qualifying relationship with a foreign entity as claimed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, the petitioner has not even acknowledged, much less provided documentary evidence, to reconcile the conflicting documentation in regards to this issue. However, as this appeal will be dismissed on the grounds discussed above, the issue of a qualifying relationship need not be further addressed.

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 sustained that burden.

ORDER: The appeal is dismissed.