

BH

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

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536



MAY 20 2003

File:  Office: TEXAS SERVICE CENTER Date:

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)

IN 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 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 Texas Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its general manager. 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 a brief. Counsel states, in part, that the beneficiary functions in a managerial and executive capacity because he supervises an essential function.

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 avers that it: (1) is a subsidiary of a foreign entity¹; (2) exports and imports telephone parts and computer accessories; and (3) employs two persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of \$82,000 per year.

The issue to be discussed in this proceeding is whether the position of general manager 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:

¹ The record contains conflicting information about the alleged foreign parent company. This issue, which was not addressed by the director, shall be discussed later in this decision.

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 with the Texas Service Center on September 25, 2000, the petitioner stated that the beneficiary would:

- Manage the entire U.S. organization.
- Direct and coordinate activities and operation of the U.S. company including developing the U.S. investment, [and] executive and personnel actions.
- Oversee all financial aspects of the company and set strategic policies and objectives.
- Plan, formulate and implement administrative and operational policies and procedures.
- Supervise and exercise total direction over subordinate employees who perform the day-to-day work with authority to hire and fire the employees.
- Act as liaison and representative for the [p]etitioner's foreign parent in the U.S.

Although the petitioner indicated on the I-140 petition that it employed two persons, one of whom was the beneficiary, the petitioner did not provide the name, job title or job description of its second employee.

The director did not find the petitioner's description of its staffing levels sufficient to determine whether the beneficiary would be employed in a managerial or executive capacity. Therefore, on May 4, 2001, the director requested a list of the petitioner's current staff, to include their job titles and the duties each individual performs.

In response, the petitioner submitted an organizational chart, which showed that the beneficiary, as the general manager, supervised one administrative assistant. According to counsel, the administrative assistant "is responsible for all administrative duties of the company. . . ." Counsel listed these tasks as answering the telephone, responding to e-mail messages and "general accounting and inventory matters."

The director determined that the proffered position was not in an executive or managerial capacity because the beneficiary would not supervise managerial or professional employees. According to the director, the beneficiary would serve only as a first-line supervisor and would be involved in the day-to-day operation of the petitioner's business.

On appeal, counsel states that the beneficiary qualifies for this immigrant visa classification because he "manages the essential function of coordinating the manufacturing division in Brazil, with the distribution and marketing function of the U.S. company." Counsel asserts that the administrative assistant, not the beneficiary, is involved in the day-to-day operation of the petitioner. Regarding the lack of managerial or professional employees who would be supervised by the beneficiary, counsel contends that the Bureau has recognized that the position of administrative assistant is a specialist or professional position because the Department of Labor assigned it a Specific Vocational Preparation (SVP) rating of seven in the *Dictionary of Occupational Titles (DOT)*.

Counsel's statements on appeal do not merit a withdrawal of the director's decision to deny the petition. Although counsel correctly asserts on appeal that the size of the petitioner, by itself, may not be the determining factor, the evidence fails to establish that the beneficiary would primarily execute the high level responsibilities that are specified in the definition of managerial or executive capacity.

As previously stated, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). Here, the record is replete with vague descriptions of the job duties that the beneficiary would be required to perform. In the initial petition filing, the petitioner listed one of the beneficiary's duties as directing and coordinating "executive actions." There is no clarifying information regarding what constitutes "executive actions" and how they relate to the responsibilities specified in the definition of managerial or executive capacity. Additionally, counsel maintains that the beneficiary manages an essential function, which is "coordinating the manufacturing division in Brazil, with the distribution and marketing function of the U.S.

company." Again, the petitioner does not identify how it distributes or markets its products, or explain how these functions are essential components of its organization. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The beneficiary's overall job description does not shed any light on his actual responsibilities. To describe the beneficiary's role with its organization, the petitioner uses generalized terms such as "manage," "plan," and "oversee" and fails to provide specific examples of the activities that the beneficiary would perform to manage the petitioner's operations, plan policies, and oversee the company's finances. Without more specific information regarding how and at what frequency the stated duties are performed, the petitioner's job description does not establish that the position offered to the beneficiary involves primarily managerial or executive duties.

Regarding the petitioner's staffing levels, the petitioner has failed to show that the beneficiary manages or directs the provision of its services rather than performing the tasks necessary for the petitioner to provide its services in the import/export arena. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). The organizational chart indicates that the petitioner employs the beneficiary in the position of general manager and one other employee in the position of administrative assistant. On appeal, counsel contends that the administrative assistant handles all of the day-to-day issues; however, the record lacks evidence to support his assertion. The administrative assistant's job description indicates that he handles clerical tasks such as answering the phone and responding to e-mail messages. There is no evidence to show that the administrative assistant handles the tasks necessary for the petitioner to import and export its products, which include, but are not limited to, marketing and sales. The absence of evidence illustrating who performs the petitioner's sales, distribution, and marketing functions, does not enable the Bureau to find that the beneficiary primarily engages in managerial or executive duties.

On appeal, counsel states that the director erred in finding that the beneficiary would act as a first-line supervisor to one nonprofessional employee. Counsel asserts that an administrative assistant position has been recognized by the Bureau as a specialist or professional position because of its SVP rating in the DOT. However, counsel's statement has no merit. Counsel does not submit any evidence of a Bureau policy that states the position of administrative assistant is professional. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The Bureau does not recognize the DOT as a persuasive source of information regarding

whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The Department of Labor's *Occupational Outlook Handbook* (*Handbook*) provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, a position's SVP rating in the *DOT* is irrelevant. The position of administrative assistant is neither specialized nor professional and, therefore, the beneficiary's supervision of one administrative assistant would not qualify him as a manager of one professional employee.

Based upon the above discussion, the petitioner has not demonstrated that the position offered to the beneficiary is in an executive or managerial capacity. Therefore, the director's decision to deny the petition shall not be disturbed.

Beyond the decision of the director, there is insufficient evidence that a qualifying foreign entity exists.

A petitioner must establish that the qualifying entity, or its affiliate or subsidiary, conducts business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). In a September 25, 2000 letter that the petitioner submitted in support of the I-140 petition, the petitioner referred to the foreign entity as "Convex USA, Inc. & Associates" and stated that the "U.S. company is a subsidiary of the Argentine company, Convex USA." The petitioner further stated that the foreign entity owned 100 percent of the petitioner's shares of stock.

On May 4, 2001, the director requested documentary evidence of business that was currently being conducted in one foreign country. In response, counsel referred to the foreign entity as Convex Amazonia, Ltda. of Brazil, and stated that the petitioner was submitting invoices from January 2001 to April 2001 to establish that business was being conducted in Brazil.

Evidence presently in the record, however, belies the claims regarding the existence of a qualifying foreign entity. The invoices submitted in response to the director's request for evidence are from the petitioner, not the alleged foreign entity. These invoices establish only that the petitioner sold products to the alleged foreign entity; they do not show that the foreign entity conducts business in one other country in addition to the United States. Additionally, there is inconsistent information in the record regarding the alleged foreign entity's name and the country in which it conducts business. The petitioner claims that the foreign entity is called "Convex USA & Associates" and is an Argentine company; counsel claims that the foreign entity's name is "Convex Amazonia, Ltda." and is a Brazilian company. Finally,



although the petitioner claimed that 100 percent of its shares of stock are owned by the foreign entity, copies of stock certificates submitted for the record indicate that the foreign entity owns only 52 shares of stock out of 100 shares that were issued. The petitioner also did not show that the foreign entity paid for the 52 shares of stock.

The petitioner has not resolved the inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the present case, there is insufficient documentation to establish that the foreign entity is actively engaged in the regular, systematic, and continuous provision of goods and/or services as an employer in the United States or in a foreign country. Therefore, the petitioner has not established that the foreign parent company is a qualifying organization. As the petitioner has not established the existence of a qualifying foreign entity, the beneficiary cannot meet the requirement of 8 C.F.R. § 204.5(j)(3)(i)(B), which states that the beneficiary must have been employed by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. As the appeal is dismissed on another ground, however, these issues will not be discussed further.

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 that burden.

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