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**BY**

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

ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street, N.W.  
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Washington, DC 20536



File:



Office: CALIFORNIA SERVICE CENTER

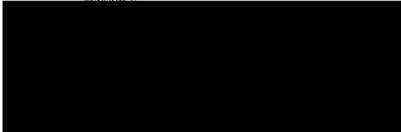
MAJ 28 2003  
Date:

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)

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 employment-based 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 is a corporation organized in the State of California in September 1997. It is engaged in the software development business. It seeks to employ the beneficiary as a project manager. 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 for a one-year period in a managerial or executive capacity for the beneficiary's overseas employer. The director also determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial capacity for the United States petitioner. The director further determined that the petitioner had not established the ability to pay the beneficiary the proffered wage of \$99,000 per year.

On appeal, counsel for the petitioner asserts that the director erred in issuing the denial in this case.

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).

The first issue in this proceeding is whether the beneficiary performed primarily managerial duties for the overseas entity and will perform primarily managerial 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.

The petitioner, through its attorney, indicated that the beneficiary had served as a project manager for the overseas entity and has been serving in that capacity for the United States entity. The petitioner indicated that the beneficiary was supervising and coordinating the activities of "project teams performing tasks related to the design, development and implementation of highly

complex software development projects for large US corporate clients . . . scheduling, resolving problems, and estimating completion time for each project phase."<sup>1</sup> The petitioner indicated that the beneficiary was guiding the work performed by professional software engineers, by supervising team leaders on each project and indirectly supervising the professional members of each project team. The petitioner indicated that the beneficiary spent 40 percent of his time providing guidance to the team in the interpretation of policies and specifications, assigning tasks, resolving problems, determining adjustments to staffing levels, and directing all technical efforts leading to the successful configurations of hardware, software systems, and applications programs. The petitioner indicated further that the beneficiary spent 50 percent of his time ensuring the proper distribution of workloads, meeting assignment deadlines, fulfilling client expectations, estimating budgets and time allocation for each project, and ensuring that each project stayed on schedule and within budget constrictions. The petitioner indicated the beneficiary spent the remaining 10 percent of his time directly supervising members of the project team to ensure compliance with client requirements, assessing job performance and writing personnel evaluation reports on his team members.

The petitioner also indicated, through its attorney, that the software engineers under the beneficiary's supervision were responsible for the "hands-on technical work." The petitioner explained, through its counsel, that the software engineers were expected to develop, design, test, code, and debug software systems by using their knowledge of various hardware and software platforms and languages. The petitioner noted that the project team size fluctuated from week to week but that the beneficiary directly supervised five "IT professionals."

The director determined that the beneficiary, in essence, functioned as a first-line supervisor over non-managerial employees. The director determined that the beneficiary's position encompassed supervisory duties over professional employees but did not entail managing the professional employees. Given a statement the petitioner's counsel made that the size of the beneficiary's project teams fluctuate due to the economy and project assignments, the director also concluded that the beneficiary did not control either the individuals or projects under his supervision. The director concluded that the petitioner's evidence was not persuasive in establishing that the beneficiary would be managing a subordinate staff of professional or managerial personnel who will relieve him from performing non-qualifying duties.

On appeal, counsel asserts that the director concluded that the beneficiary primarily supervises subordinates rather than manages

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<sup>1</sup> The director recited the petitioner's complete job description for the beneficiary's position. The job description will not be repeated here.

the petitioner's projects as a whole. Counsel asserts that the description of the beneficiary's duties indicates that the beneficiary oversees the development and design of highly complex systems-level software packages and programs while guiding the work being performed by professional software engineers. Counsel asserts that the beneficiary's responsibilities encompass much more than supervision of engineering professionals which occupies only 10 percent of the beneficiary's time.

Counsel's assertions are not persuasive. When 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 director acknowledges that the positions subordinate to the beneficiary's position are professional positions. Even if the beneficiary is simply performing the duties of a first-line supervisor by distributing workloads, ensuring deadlines are met, guiding the project team, and providing budget and time estimates, the beneficiary is supervising professional employees. As stated at section 101(a)(44)(A)(iv) of the Act, "[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 converse implication of this statutory statement is that, if a first-line supervisor supervises professional employees, the first-line supervisor may be acting in a managerial capacity. Counsel, on appeal, asserts that the beneficiary spends only 10 percent of his time on this activity.<sup>2</sup> Such a percentage is not indicative of an individual primarily involved in supervising individuals in professional positions.

Moreover, the petitioner must establish that the requirements of the beneficiary's position encompass the remaining elements found in the statutory definition of managerial capacity. Although the petitioner's description of the beneficiary's duties is indicative of an individual responsible for carrying out duties related to specific projects, the petitioner has not provided sufficient documentary evidence of the projects. The petitioner has not described nor provided documentary evidence of the specific projects under the beneficiary's control.

The director's conclusion that the beneficiary does not control either the individuals or projects under his supervision because of the economy and resulting assignment of projects is not exactly on point. First, the petitioner has described the duties of the professional employees subordinate to the beneficiary's position and has adequately shown that these individuals are subject to the beneficiary's supervision, although it is not clear how much time

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<sup>2</sup> The record is confusing regarding the amount of time the beneficiary spent supervising "IT professionals" and whether the time spent was directly supervising "IT professionals" or directly supervising or guiding "team leaders" and indirectly supervising the "IT professionals."

the beneficiary spends on this activity. Second, the actual deficiency of the record lies in the lack of documentary evidence verifying projects actually managed and controlled by the beneficiary. The beneficiary cannot be expected to control the economy or even the assignment of projects in this case. The petitioner, however, must present evidence of verifiable projects along with a clear description of the beneficiary's duties and consistent evidence that the beneficiary's time is spent primarily managing those projects. The petitioner has failed to establish that the beneficiary primarily manages a subdivision, function or component of the petitioner.

The second issue in this proceeding is whether the petitioner established that the beneficiary was employed by the overseas entity in a managerial or executive capacity for one full year prior to entering the United States as a nonimmigrant.

The petitioner used the same job description for the beneficiary's position with the overseas entity as the United States entity. As discussed above, the petitioner has not established that the beneficiary managed verifiable projects while employed by the United States entity. As the same job description is applicable to the United States petitioner and the foreign entity, the petitioner also has not established that the beneficiary was employed in a managerial or executive capacity for the foreign entity. Moreover, the director also determined that the petitioner had not submitted sufficient documentary evidence that the overseas entity had actually employed the beneficiary for a full one-year period prior to the beneficiary's entering the United States as a nonimmigrant. The director noted that the petitioner had submitted a form showing taxes deducted from the beneficiary's overseas income. The director focussed on the third page of the form submitted showing actual payments made to the beneficiary. The record reflected payments beginning May 8, 1999 and ending March 28, 2000. The director concluded that the petitioner had provided supporting documentary showing the beneficiary's employment for only eleven months out of the three-year period prior to the beneficiary's entry into the United States as a nonimmigrant, instead of the required one-year period. On appeal, counsel notes that the form covered the time period April 1, 1999 through March 31, 2000 and this time period is reflected on the first page of the form. Counsel, however, does not explain why the beneficiary was paid for only eleven months out of the year. There may be a simple explanation; however, the AAO declines to speculate regarding the discrepancy. 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 (BIA 1988). As neither counsel nor the petitioner provides additional evidence on appeal to explain this discrepancy, there is insufficient evidence to overcome the director's decision on this issue.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$99,000 per year.

The regulation at 8 C.F.R § 204.5(g) (2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has provided its Internal Revenue Service (IRS) Forms 1120 for the years 1999, 2000, and 2001. Each computer print out shows the petitioner experiencing negative taxable income in each of those years. In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner's IRS Forms 1120, however, do not demonstrate that the petitioner has the ability to pay the beneficiary the proffered wage of \$99,000 per year.

The IRS computer print outs also show that the petitioner paid employees and officers in each of those years. The petitioner also submitted its California Forms DE-6, Quarterly Wage and Withholding Report for a one-year time period ending March 31, 2001. The California Form DE-6 shows that the petitioner paid the beneficiary \$70,653 for the eight months the petitioner employed the beneficiary during this time period. Counsel on appeal acknowledges the petitioner's losses for each year but points to the petitioner's cash on hand and asserts that the petitioner has never failed to fulfill its payroll obligations.

As noted above, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return. The Bureau will also consider the fact that the petitioner has paid the beneficiary the proffered wage in the past. In this instance, the petitioner has submitted some independent documentation that it has



actually paid the beneficiary, but the record stops short of showing actual payments to the beneficiary for a full year or in the amount of the proffered wage. Counsel's assertion that the petitioner has always fulfilled its payroll obligations is not sufficient. 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). The petitioner has not provided evidence on appeal to overcome the director's decision on this issue.

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.