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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass Ave., 3rd Floor
425 Eye Street N.W.
Washington, D.C. 20536

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER

Date: NOV 17 2003

IN RE: Petitioner: [REDACTED]
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]

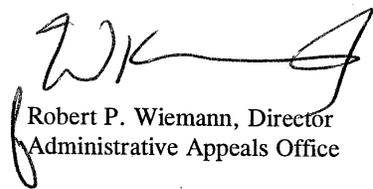
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Texas Service Center, denied the preference visa petition. The matter was subsequently appealed to the Administrative Appeals Office (AAO). The appeal was summarily dismissed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted; the director's decision denying the petition, however, will be affirmed.

The petitioner was incorporated in the State of Texas in 1998 and is claimed to be a subsidiary of [REDACTED] located in Pakistan. The petitioner is doing business as a computer clinic. It seeks to employ the beneficiary as its vice president and course instructor. 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 or would be employed in a managerial or executive capacity.

On appeal, counsel disputed the director's findings. Currently, on motion, counsel reiterates his prior objections to the director's findings and submits additional evidence in support of his assertions.

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.

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

In the initial filing, the petitioner described the beneficiary's prospective duties as follows:

[The beneficiary] oversees the business operations of Brilliant Career Computer Institute. [He] oversees the systems analysis division and serves as a computer instructor.

In an additional statement the petitioner stated that the beneficiary "will be responsible for overseeing the administration, marketing, class scheduling, curriculum; and oversee the systems analysis division."

On March 8, 2001, the director instructed the petitioner to submit, in part, its organizational chart identifying the beneficiary's position, as well as the names and position titles of the petitioner's other employees. In addition, the petitioner was asked to submit a more detailed description of

the beneficiary's daily job duties and the percentage of time spent performing each duty. The petitioner was also asked to provide W-2 wage statements for its employees.

The petitioner provided the following description of the beneficiary's daily job duties:

Class starts at 9:00 AM and ends at 12:30 PM with two brakes[.] Then after Lunch spent time on the companies [sic] projects with Employees[,] how they are doing if they stuck help them. Monitor daily and weekly report for all the software related with different software clients And between 4:00 PM to 5:00 PM check the students['] attendance [sic] their homeworks [sic] and assignments and arrange the meeting for those Students who going slow and give special time and instruction so that then can move fast. Fax or emails the report and bill the invoice for payments. Some Classes are start in the alternative days. As 6:30 PM and end at 10:00 PM with two brakes. Visit clients twice a week for presenting how to use the new software modules. . . . [sic]

The petitioner specified that 45% of the beneficiary's time is devoted to teaching computer software classes, 40% of his time is devoted to computer software projects, 10% of his time is devoted to monitoring employees with problems in programming modules, and 5% of his time is spent making phone calls.

Although the petitioner provided an organizational chart that illustrates the general structure of its different departments, the chart does not name any of the petitioner's employees or their job titles. That information is provided separately without any indication as to who supervises whom within the petitioner's organizational hierarchy. In the description of employee duties, the petitioner indicated that the beneficiary performs the duty of an accountant, and helps with hardware classes and networks.

The director denied the petition, concluding that the evidence submitted by the petitioner indicates that the beneficiary has been and would be performing day-to-day non-qualifying duties associated with the provision of services.

On motion, counsel asserts that the director's findings are erroneous and contradicts the earlier percentage breakdowns provided by the petitioner. Specifically, the petitioner now claims that rather than directly teaching computer classes and working on software projects, as claimed earlier, the beneficiary oversees the teaching of computer courses and the progress of software computer software projects. Counsel provides no explanation, however, for two letters (submitted by the petitioner in response to the request for additional evidence) in which the operations manager of IPEC and an attorney from the Law Offices of R.V. Reddy discuss services that the beneficiary directly provided to their respective organizations. The former individual discussed a seminar that the beneficiary taught in his organization, while the latter individual discussed a database system that the beneficiary designed and developed for his law firm. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any 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).

Additionally, counsel observes that Congress omitted language discussing individuals who produce a product or provide a service from the Immigration Act of 1990 and asserts that this is a clear indicator that such individuals are not precluded from qualifying as multinational managers or executives. However, the AAO will not draw this conclusion based solely on an omission. Counsel does not reference a preexisting precedent decision that discussed individuals that are engaged in the production of a product or service. That precedent clearly states that an employee who primarily performs the tasks necessary to produce a product or to provide a service, rather than managerial or executive duties, 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). Even considering the enactment of the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary*, p. 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform

managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel is not persuasive in asserting that Congress's mere omission of certain language is equivalent to affirmatively overturning the precedent set in the above decision.

Counsel further asserts that the beneficiary is a functional manager and as such must be allowed to perform the essential function since the law does not require a functional manager to supervise employees. Counsel's argument, again, is without merit, as it assumes that the functional manager's lack of subordinate employees necessitates him to perform the essential function(s) he is supposed to be managing. To the contrary, the functional manager can manage an essential function while someone else manages the employees who perform that function. Under no circumstances can the functional manager actually perform the essential function. As stated above, precedent case law specifically prohibits an individual who provides a product or service from qualifying as a multinational manager or executive. Even though 8 C.F.R. § 204.5(j)(4)(ii) instructs CIS to consider the "reasonable needs" of the petitioning entity, the reasonable needs of the petitioning organization do not override the petitioner's burden of establishing that the beneficiary primarily performs managerial duties. To the contrary, if the petitioner's reasonable needs are such that the beneficiary is required to be directly involved in running its daily operations, that factor in and of itself suggests that the petitioner has no need for a primarily managerial or executive position.

In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the petitioner's description of the beneficiary's job duties, as well as the submitted documents, suggests that the beneficiary actually provides services to the petitioner's clientele. CIS is lead to believe, therefore, that the beneficiary is performing as a professional or "staff officer," not as a manager or executive.

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The record does not sufficiently 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. To the contrary, the description of the beneficiary's duties indicates that the beneficiary is one of the key providers of the services offered to the petitioner's clients. The Service 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.

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 director's decision, dated June 26, 2001 is affirmed.