

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

B4

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



NOV 19 2003

FILE: WAC 01 280 51514 Office: CALIFORNIA SERVICE CENTER Date:

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]

PUBLIC COPY

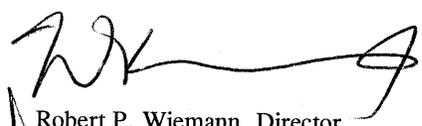
INSTRUCTIONS:

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 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 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 1997 in the State of California and is claimed to be a subsidiary of [REDACTED] located in Korea. The petitioner is engaged in the business of marketing and selling communication equipment that is manufactured by the parent company in Korea. It seeks to employ the beneficiary as its "Executive/Chief of Technical." 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 in the United States.

On appeal, counsel disputes the director's findings and submits additional evidence in support of his argument.

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 employed in a managerial or executive capacity in the United States.

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 "responsibilities will be to direct, manage and develop the business in the United States. He will set goals and implement company policy according to [the] parent company's guidelines."

On February 7, 2002, the director instructed the petitioner to submit additional evidence, including the petitioner's organizational chart, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of the employees under the

beneficiary's supervision, as well as their brief job descriptions, educational levels, and salaries/wages of the beneficiary's subordinates.

The petitioner's response included its organizational chart, which listed a total of nine employees. At the top of the hierarchy is the company president who is the beneficiary's immediate supervisor. The chart indicates that the beneficiary's subordinates consist of four sales people and a technician. The petitioner also provided the following additional description of the beneficiary's duties:

[The beneficiary] will direct, manage and supervise the operation of the Technical Department. He will set company goals and policy according to the guidelines set by the parent company. He will be responsible for the Technical Department including resolving any dispute with customers regarding products and services. [The beneficiary] will be responsible for all technicians and sales people, including independent contractor[s]. He will be responsible for increasing sales and business in the U.S.

The director denied the petition, concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary's duties in the United States would be of a primarily managerial or executive capacity. The director stated that the petitioner's employees cannot be considered professional because "[t]he industry is a service industry that does not involve or require 'professional' employees." Although this appeal will be dismissed, it is noted that the director's comment is inaccurate, as there is no law or legal precedent that suggests that a service industry cannot employ professional employees.

Pursuant to section 101(a)(32) of the Act, the term "profession" includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers 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.

Thus, in order to determine whether a particular employee is a professional, the director must consider the above statutory and regulatory definitions and apply them to any position descriptions as provided by the petitioner. In the instant case, the director's determination regarding the professional status of the beneficiary's subordinates is entirely based on the nature of the industry in which they work. For this reason, the director's comment is withdrawn.

Nevertheless, the petitioner failed to provide the director with position descriptions and educational levels of the beneficiary's subordinate employees. This information was specifically requested by the director in the request for evidence. Failure to provide requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As previously stated, such information is crucial when trying to determine whether an employee is a professional. Since the petitioner failed to provide this necessary information, CIS cannot affirmatively determine that the beneficiary's subordinates are professional. There is also no evidence suggesting that these subordinate employees are managerial or supervisory since they do not manage or supervise other employees. Therefore, it cannot be concluded that the beneficiary supervises professional, managerial, or supervisory personnel.

Pursuant to 8 U.S.C. § 1101(a)(44)(A)(ii), the petitioner may also establish eligibility as a multinational manager or executive by providing evidence that the beneficiary manages an essential function within the organization, or a department or subdivision of the organization.

On appeal, counsel asserts that the beneficiary "manag[es] a major function/department of the company" as a result of his technological knowledge of the products sold by the petitioner. In order to establish that the beneficiary is a functional manager, the petitioner must specifically identify the function, provide evidence that it is essential, and submit sufficient evidence that the beneficiary is not actually performing the essential function.

In examining the executive or managerial capacity of the beneficiary, CIS 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 description of duties as provided in response to the request for additional evidence suggests that the beneficiary will be directly involved in resolving customer disputes. This task is neither managerial nor executive and therefore cannot be considered qualifying. However, as a result of the petitioner's failure to submit a percentage breakdown of the beneficiary's specific tasks, the AAO cannot determine how much of the beneficiary's time will be spent performing this non-qualifying task.

Whether the beneficiary is a "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petition fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time he spends on them. This failure of documentation is important because several of the beneficiary's daily tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F.Supp.2d 22, 24 (D.D.C. 1999).

Moreover, even though counsel asserts on appeal that the beneficiary is, in essence, a functional manager, the beneficiary's job description states that the beneficiary's responsibilities includes managing the company's personnel who, as previously established, are not professional, managerial, or supervisory employees. The beneficiary's remaining duties, which include directing, managing, and supervising the technical department and setting the company's goals and policies, are too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis in an effort to execute those duties. 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 leads the AAO to conclude that the beneficiary is performing as a professional or "staff officer," but 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. The AAO 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. For this reason, the petition cannot be approved.

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.