

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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



FILE: WAC 02 045 56589 Office: CALIFORNIA SERVICE CENTER

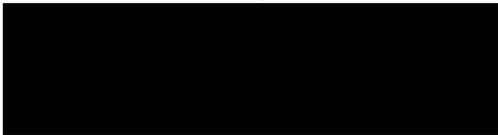
Date:

NOV 19 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)

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 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.

A handwritten signature in black ink, appearing to read "RW", is written over a horizontal line.

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 the State of California and is claimed to be a subsidiary of [REDACTED] located in Canada. The petitioner is engaged in the business of electrical contracting. It seeks to employ the beneficiary as its president and general 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 or would be employed in a managerial or executive capacity.

On appeal, counsel submits a statement disputing the director's findings.

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.

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] researches new opportunities to establish contracts; conducts extensive market research via the Internet; establishes professional contacts and community involvement; acts as a consultant to existing electrical projects; interacts with contractors and sub-contractors to ensure high-quality project completion; and improves budget control, time records and legal compliance. Finally, [the beneficiary] completes daily office management such as supervision of the office staff, establishes and monitors the budget, completes payroll and other

employee withholdings, ensures fiscal and legal compliance with tax and state regulations, and negotiates all other aspects of the company.

On May 29, 2002, the director instructed the petitioner to submit a number of additional documents. As subsequently pointed out by counsel, the requirement that the petitioner acquire sufficient physical premises are applicable to a new office petition for an nonimmigrant L-1A petition and are irrelevant in an I-140 petition. 8 C.F.R. § 214.2(1)(3)(v)(A). There is no correlative requirement for this immigrant visa petition. Therefore, any comments applicable to a new office petition for a nonimmigrant L1-A, and are made by the director in the denial regarding the issue of the petitioner's physical premises are hereby withdrawn and will not serve as a basis for dismissing this appeal.

The director also requested that the petitioner submit its *current* organizational chart identifying all of its employees, their job descriptions, and educational levels. In addition, the petitioner was asked to submit a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, as well as state quarterly wage reports for all employees for the last four quarters.

The petitioner complied with the director's request for a *current* organizational chart and provided the following breakdown of the beneficiary's job duties in the United States:

- Hiring, firing, training all employees (15%)
- Organizing daily tasks performed by employees and supervising the purchasing of all materials and tools required for job sites and office (20%)
- Pursuing, estimating, and negotiating all contracts (25%)
- Responsible for job site and employee safety, insurance, and workman's compensation requirements (10%)
- Attending all site inspections and meetings with general contractors (15%)

- Legal and fiscal compliance assurance (15%)

The petitioner indicated in the organizational chart that it currently employs one temporary employee for clerical support and payroll, three electricians, and one estimator, none of whom are college graduates. It is noted that section 101(a)(32) of the Act states that 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 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 none of the petitioner's employees have a baccalaureate degree and none of the positions require a bachelor's degree or its equivalent, they cannot be considered to be professional employees.

In addition, the petitioner submitted its Form DE-6 quarterly wage reports for the third and fourth quarters of 2001, and for the first and second quarters of 2002.

The director denied the petition, noting that not all of the employees listed in the petitioner's organizational chart appear to have been paid employees when the petition was filed in November of 2001. However, as properly pointed out by counsel, the petitioner's failure to submit specific evidence that was never requested by the director cannot be used to discredit a petitioner's otherwise consistent claim. The director cannot, therefore, blame the petitioner for failing to submit an organizational chart that would have reflected the petitioner's personnel structure at the time the petition was filed. Consequently, the director's adverse comments regarding this issue are hereby withdrawn.

The director further determined, based on the tax documentation submitted, that the record does not establish that the beneficiary is employed by the petitioner. While the director is correct in determining that the petitioner's tax documents do not establish the beneficiary's employment with the petitioning entity, the director's conclusion that the beneficiary does not work for the petitioner is incorrect, as it is based entirely on

the petitioner's tax documents and fails to take into account other evidence in the petitioner's record of proceedings. The record contains numerous invoices for supply orders made by the beneficiary, as well as several correspondences reflecting communications between the beneficiary and other individuals regarding such issues as potential additional employees and workman's compensation insurance. The director erroneously concluded that the petitioner does not employ the beneficiary. As such, the director's conclusion in regard to this issue is also hereby withdrawn.

Nevertheless, the director was correct in his overall conclusion 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.

On appeal, counsel asserts that the petitioner has submitted sufficient evidence to establish that the beneficiary is employed as both a manager and an executive. Counsel mentions numerous documents containing the beneficiary's signature, discusses the beneficiary's key role in obtaining employee and liability insurance, and claims that the beneficiary is the petitioner's sole decision-maker.

However, in examining the executive or managerial capacity of the beneficiary, the AAO 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 stated initially that the beneficiary's duties include extensive market research, consulting in existing electrical projects, and directly interacting with contractors and sub-contractors regarding various projects. In response to the request for additional evidence, the petitioner specified further that the beneficiary spends 25% of his time pursuing, estimating, and negotiating all contracts, thereby indicating that the beneficiary is the only individual who solicits customers for the petitioner's service. The same breakdown of duties states that the beneficiary spends 15% of his time personally overseeing job sights, and 20% of his time directly supervising the company's non-professional and non-managerial employees whom he also personally trains. This training consumes another 10% of his time. Such duties, which together consume 70% of the beneficiary's time, suggest that the beneficiary is performing as a professional or "staff officer," not as a manager or executive. The record also contains a number of invoices for equipment purchased, all of which are

signed by the beneficiary, thereby further justifying the conclusion that the beneficiary's duties are not primarily managerial 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 record suggests that the beneficiary will be primarily focused on duties that are neither managerial nor executive. Although counsel asserts that the director has discriminated against the petitioner based on the size of its personnel, the record does not support his argument. To the contrary, the director's consideration of the size of the petitioning organization comports with current law. While size cannot be the sole consideration in determining eligibility for multinational manager or executive status, the director can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. See *Systronics Corp. v. I.N.S.*, 153 F.Supp.2d 7, 15 (D.D.C. 2001) (stating that CIS correctly considered size of company as well as beneficiary's duties when denying visa to a multinational manager or executive). In the instant case, the description of the beneficiary's duties, as discussed above, suggests that the beneficiary continues to perform non-qualifying tasks; therefore, regardless of the petitioner's size the beneficiary does not fill the role of manager or executive pursuant to the statutory definition. CIS 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 appeal is dismissed.