

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

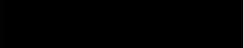
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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
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Washington, DC 20536

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invasion of personal privacy

File  Office: CALIFORNIA SERVICE CENTER

Date: NOV 21 2003

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 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 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 March 2001 in the State of California. It is engaged in importing and selling sporting goods and toys. It seeks to employ the beneficiary as its 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 primarily managerial or executive capacity. The director also determined that the petitioner had not established that it had been engaged in the systematic, regular, and continuous provision of services for one year prior to filing the petition.

On appeal, counsel for the petitioner asserts that the director erred in his decision in that it was based on speculation instead of the facts and the law.

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. See 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established it has been engaged in doing business for one year prior to filing the petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D).

The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as:

*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petitioner was organized in March 2001. The director determined that the petitioner had not provided evidence to show that it was conducting business from January through August 2002. The record and documents submitted on appeal establish that the petitioner was engaged in the regular, systematic, and continuous provision of goods for one year prior to filing the petition. The director's decision will be withdrawn as it relates to this issue.

The second issue in this proceeding is whether the beneficiary 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 notes that it is seeking approval of the petition based upon the beneficiary's assignment in a managerial capacity, rather than in an executive capacity.

The petitioner initially described the beneficiary's job duties as:

- Plan and develop organization policies and goals, and implement goals through subordinate administrative personnel.
- Coordinate activities of divisions or departments, such as distribution, shipping, operating, planning, sales, manufacturing, maintenance, or research and development, to effect operational efficiency and economy.
- Direct preparation of directives to division or department administrator outlining policy, program, or operations changes to be implemented.
- Develop and maintain new or existing business relationships with suppliers and customers both in the U.S., Taiwan and other countries.
- Direct and coordinate promotion of products or services performed to develop new markets, increase share of market, and obtain competitive position in industry.
- Analyze division or department budget requests to identify areas in which reductions can be made, and allocates operating budget.
- Confers with administrative personnel, and reviews activities, operating, logistics information technology and sales reports to determine changes in programs or operations required.
- Communicate with the Taipei corporation in regards to operation and follow directions from the headquarter.

- Promote organization in industry, manufacturing or trade associations.

The director requested further evidence to demonstrate that the beneficiary's assignment was in a managerial capacity. The director requested a more detailed description of the beneficiary's duties and the petitioner's California Forms DE-6, Quarterly Wage Report for the first, second, and third quarters of 2002. The director also requested a copy of the petitioner's organizational chart including all employees under the beneficiary's supervision listed by name and job title. The director further requested a brief description of job duties and the sources of remuneration of all employees.

In response, the petitioner provided a description of the beneficiary's job duties similar to the job description previously provided:

- Plan, develop and establish policies and objectives of corporation in accordance with board of directors and Taiwan headquarters;
- Coordinate activities of divisions or departments, overseas sales and operations to maximize profits and efficiency;
- Direct preparation of directives to division or department administrator outlining policy, program, or operations changes to be implemented to ensure smooth functioning and customer satisfaction;
- Develop and maintain new or existing business relationships with suppliers and customers both in the U.S., Taiwan and other countries to achieve the goal of maximizing profits by buying the cheapest and selling the most;
- Direct and coordinate promotion of products or services performed to develop new markets, increase share of market, and obtain competitive position in industry;
- Analyze division or department budget requests to identify areas in which reductions can be made, and allocates operating budget in order to cut cost and waste to maximize profits and increase cash flow;
- Confers with administrative personnel, and reviews activity, operating, logistics information technology and sales reports to determine changes in programs or operations required;

- Communicate with the Taipei corporation in regards to operation and follow directions from the headquarter[s] regarding marketing expansion, personnel changes, additional investment etc.;
- Promote organization in industry, manufacturing or trade associations to make the company well known; and
- Evaluate performance of staff and determine annual raise range.

The petitioner also provided its organizational chart showing the filled positions of general manager (the beneficiary's position), sales manager, operation manager, and clerical assistant. The petitioner's California Form DE-6 for the third quarter of 2002 confirmed the employment of two individuals in the first two months of the quarter and of four individuals in the last month of the quarter. Based on the California Form DE-6, the petitioner employed only the individuals in the positions of sales manager and clerical assistant when the petition was filed on August 21, 2002. The beneficiary began her employment as the petitioner's general manager in L-1 intracompany transferee status in September 2002. The operating manager apparently also began employment with the petitioner in September 2002, a few days to a month after the petition was filed.

The director determined that the petitioner had not provided a description of the beneficiary's duties that established that the beneficiary was or would be employed in a primarily managerial or executive capacity. The director determined that the petitioner employed the beneficiary, a sales manager and two part-time employees. The director concluded that it was reasonable to believe, based on the petitioner's organizational structure, that the beneficiary would perform non-qualifying duties. The director also observed that the individuals holding the positions of "manager" were not managing professional employees. The director concluded that these "managers" were not managers for immigration purposes. Therefore, the beneficiary would not be supervising subordinate managers or professional employees and as such was in essence a first-line manager of non-professional and non-managerial employees. The director finally determined that the petitioner had not demonstrated that the beneficiary would be a functional manager.

On appeal, counsel asserts the beneficiary's position is an assignment that fulfills the criteria of managerial capacity. Counsel also asserts that the director's conclusion that the beneficiary is a first-line manager and that the petitioner does not have a reasonable need for an executive is speculative and not supported by an evaluation of the facts. Counsel further asserts that the director erred when finding that the beneficiary would not supervise the work of managerial employees and would not manage or direct the management of a department, subdivision, function, or

component of the petitioner. Counsel submits an opinion of a University of Georgia Professor of Management who has evaluated the management and organization of the petitioner and has provided his opinion on the proffered position and business needs of the petitioner.

CIS may, in its discretion, use statements submitted as expert testimony as advisory opinions. However, when an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm., 1988). In this matter, the record does not support the petitioner's management expert's opinion, as will be discussed in detail below.

Counsel's assertions are not persuasive. 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). When 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). The petitioner must establish that the facts of the instant petition sufficiently convey an understanding of the beneficiary's duties coupled with substantiating documentary evidence that the beneficiary's assignment is primarily executive or managerial.

The petitioner has provided a position description that encompasses broad managerial concepts and functions. The petitioner does not provide substantiating evidence to support the generalities stated in the description. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

When examining the remainder of the record, it becomes apparent that the beneficiary has been and will be primarily performing operational tasks for the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services 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). When the petition was filed, the petitioner employed two individuals. At some point in the month following the filing of the petition, the beneficiary began her work for the petitioner and one other individual was also hired. However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must be able to support an employee whose primary duties relate to operational or policy management, not to the supervision of lower

level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company when the petition is filed.

The petitioner's description of the beneficiary's duties indicates that she will "implement goals through subordinate administrative employees," and "coordinate activities of divisions or departments," and "analyze division or department budget requests." However, the petitioner had only two employees, a sales manager and a clerical assistant, when the petition was filed. The petitioner has not provided evidence that it used outside contractors to sell the petitioner's products or to perform routine administrative or operational duties. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra; Republic of Transkei v. INS, supra; Matter of Treasure Craft of California, supra.*

Moreover, the petitioner indicates that the beneficiary will "develop and maintain new or existing business relationships," "[d]irect and coordinate promotion of products or services performed to develop new markets," and "[p]romote [the] organization in industry, manufacturing or trade associations." This description is insufficient to describe an individual primarily performing a managerial function with respect to these tasks rather than an individual primarily performing the sales services necessary to establish the petitioner's business.

Further, the description of duties for the beneficiary's subordinate "managerial" employees does not describe individuals who supervise other employees or manage particular tasks. First, as stated previously, the petitioner did not employ individuals who would be subordinate to either the sales manager or the operations manager when the petition was filed. Second, the record does not establish who performs the petitioner's day-to-day tasks except for the sales manager, the clerical assistant, and the beneficiary.

The AAO agrees that the director could have more thoroughly detailed the deficiencies in the record relating to the conclusions that the beneficiary would be a first-line manager and that the petitioner did not require the services of an executive. However, the petitioner has not provided sufficient evidence to establish a reasonable need for an individual in an assignment that would be primarily managerial or executive when the petition was filed. The record does not establish that the staff on hand when the petition was filed would relieve the beneficiary from primarily performing non-qualifying duties.

The record does not substantiate that the positions of operations manager and sales manager should be considered managerial and professional positions. The descriptions of duties for these positions are more indicative of individuals performing operational functions instead of managerial or professional functions. At

most, the two positions' duties require experience in carrying out administrative and sales functions. The sales manager and operations manager duties do not include primarily controlling individual workers and organizing work roles.

Counsel's assertions may suggest that the beneficiary manages an essential function of the petitioner. However, the term "essential function" applies generally when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. A petitioner that claims a beneficiary is managing an essential function, must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

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.