

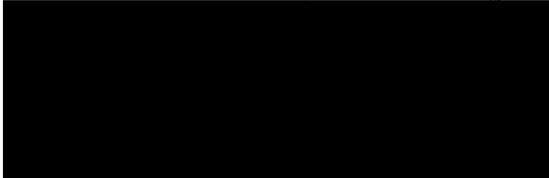
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File:

Office: NEBRASKA SERVICE CENTER

Date:

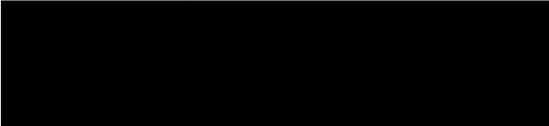
NOV 21 2003

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, Nebraska 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 1998 in the State of Illinois. It is engaged in providing high-profile technical documentation solutions, e-business, and telecommunications network consulting services. It seeks to employ the beneficiary as its information development division vice-president. 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 the ability to pay the beneficiary the proffered wage of \$65,000 per year.

On appeal, counsel for the petitioner asserts that the director erred in his decision. Counsel asserts that the beneficiary is currently and will be employed in a managerial capacity, that the director improperly second guessed its prior approval of the beneficiary's managerial classification, and that the petitioner has the ability to pay the proffered wage.

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 its ability to pay the beneficiary the proffered wage of \$65,000 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.

On appeal, the petitioner provided the beneficiary's pay stubs for the last quarter of 2001. The pay stubs show that the beneficiary had been paid a gross income of \$77,916.71 at the end of 2001. The petitioner also provides income balance statements and bank statements. Upon review of the totality of the evidence the petitioner has established that it paid the beneficiary the proffered wage in 2001. The director's decision will be withdrawn only as it relates to this issue.

The second issue in this proceeding is whether the beneficiary will perform primarily managerial or executive 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.

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.

The petitioner initially indicated that the beneficiary's job responsibilities were allocated as follows:

Develop the Information Development division of the company, supervise and direct technical operations as well as projects undertaken by the department. 30 percent

Plan[,] formulate and develop policies for undertaking all technical projects and operation support processes. 30 percent

Develop an effective recruitment program to ensure that qualified personnel are hired; [p]repare an employment manual and develop hiring guidelines. 20 percent

Develop a client base, build contacts with new clients, expand operations of the company. 20 percent

The director requested further evidence to demonstrate that the beneficiary's assignment was in a managerial or executive capacity. The director requested the petitioner's organizational chart showing the beneficiary's position in relation to others in the company. The director also requested a copy of the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporate Income Tax Return for 2000.

In response, the petitioner noted that the beneficiary had been employed in an L-1A intracompany transferee status in the United States. The petitioner also provided a description of the beneficiary's job duties:

Initially, [the beneficiary] will be responsible for overseeing the overall startup phase of the company. During the first phase of development, efforts will be concentrated on the Information Development Division in line with the business objectives of the parent company. Once the company is established, the transferee will be responsible for obtaining, staffing and administering contracts for the Information Development Division as well as developing the Computer and Telecommunications Division of [the petitioner], in order to enable future growth. His responsibilities will include but not be limited to: divisional financial planning, material and human resources recruitment and management, customer development and liaison, contract negotiation, management of the contract execution and planning, recruitment, co-ordination and managing project teams.

The petitioner also indicated that the beneficiary would be responsible for hiring and supervising telecommunications technical writers and information development engineering professionals. The petitioner stated further that the beneficiary's position was a managerial position with executive responsibility, and that the beneficiary would be responsible for planning, formulating, and implementing administrative and operational policies and procedures, and would have authority to engage the company legally, financially, and contractually.

The petitioner also provided its organizational chart showing the beneficiary as vice-president supervising the information

development group. The information development group included a development engineer and a development consultant. The petitioner also submitted an employee policy statement signed by the beneficiary, several consulting agreements to provide services to outside companies signed by the beneficiary, and the petitioner's letter offering part-time employment to an individual for the position of development engineer.

The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the petitioner had employees other than the beneficiary. The director also determined that it appeared the beneficiary would be involved in performing routine operations activities of the corporation. The director concluded that the evidence did not demonstrate that the beneficiary would be primarily employed in a managerial or executive capacity.

On appeal, counsel asserts that each duty listed in the initial description of the beneficiary's duties is a managerial duty. Counsel also asserts that it is clear from the beneficiary's job title and duties that he manages a department and exercises direction over the day-to-day technical operations and projects undertaken by the company. Counsel also cites several unpublished decisions in support of his claims. Counsel also contends that the two prior approvals of the beneficiary as an L-1A transferee demonstrate that the beneficiary is qualified for this visa classification.

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 initially stated that the beneficiary would supervise and direct technical operations and projects and develop policies for undertaking all technical projects and operation support processes. However, managers and executives generally plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. The petitioner has not provided evidence that it employs a sufficient number of employees or independent contractors to carry out the functions of the organization. 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).

The petitioner has provided evidence of only one part-time employee to assist the beneficiary in carrying out consulting duties required by the agreements with outside firms; thus, the beneficiary is the individual who is primarily performing the company's basic function of providing consulting services to outside companies. 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). In addition, the petitioner's initial description indicates that the beneficiary would be responsible for developing a recruitment program and developing a client base. These duties also suggest that the beneficiary provides basic operational and administrative functions for the petitioner.

In the petitioner's response to the request for evidence, the petitioner added that the beneficiary would plan, formulate and implement operational policies and procedures. The petitioner also submitted an employee policy statement. However, the development of one policy statement is insufficient to establish that the beneficiary's time is spent primarily establishing the organization's goals and policies. Moreover, establishing goals and policies of a company is an element contained in the statutory definition of executive capacity. Therefore, it appears that the petitioner is claiming that the beneficiary will be employed as both a manager and an executive. However, a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary as both an executive and a manager. A petitioner may not rely on partial sections of the two statutory definitions to create a hybrid "executive/manager."

It is unclear whether counsel is claiming that the beneficiary manages an essential function of the petitioner. However, the AAO will address the issue here. 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 provided no evidence that the beneficiary manages an essential function.

In sum, the record does not establish that the beneficiary's primary assignment was or would be in a managerial or executive capacity when the petition was filed. 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.

Counsel's citation to unpublished cases carries little probative value. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished cases. Moreover, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c).

Counsel's contention that the prior approvals of the beneficiary as an L-1A intracompany transferee necessarily qualify the beneficiary for this visa classification is not persuasive. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

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.