

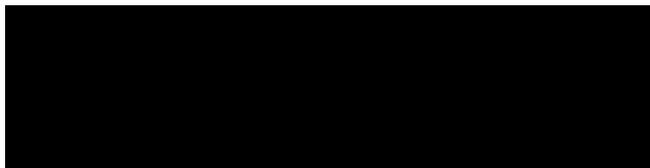
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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**B4**

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



File: WAC 02 071 50945

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 branch office of a company established in India in 1994. The petitioner was authorized to conduct intrastate business in the State of California in July 1999. It is engaged in providing data processing, software development, management, and consulting services. It seeks to employ the beneficiary as its chief executive officer. 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.

On appeal, counsel for the petitioner asserts that the director's reasoning lacked clarity and failed to provide a sound basis for his conclusion.

Section 203(b) of the Act states, in pertinent part:

Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (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 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 stated that the beneficiary would be "in charge of business development, supervise marketing strategy development, supervise general and operational management, supervise human resource development management, supervise technical project management, and any issues that pertain to organizational growth and development."

The director requested the petitioner's organizational chart depicting its managerial hierarchy and staffing levels. The director also requested that the petitioner include a brief description of job duties, educational levels, annual salaries/wages for all employees under the beneficiary's supervision. The director further requested a more detailed description of the beneficiary's duties including the percentage of time spent in each of the listed duties. Finally, the director requested the petitioner's California Form DE-6, Employer's Quarterly Wage Reports (or wage reports for any appropriate state) for the last four quarters.

In response, the petitioner stated that the beneficiary would "continue to be one of the key personnel for realizing the target growth for Petitioner," and that he would be "instrumental in leveraging his business, technical and managerial experience to lead Petitioner in an effective manner," and that he would "focus on building strategic alliances, promoting business development, overseeing of the marketing and sales operations, general business administration and future planning." The petitioner stated that the beneficiary would be "expected to enter into business alliances and forge new relationships in the fields of data processing, consulting, and software project outsourcing with other US corporations." The petitioner also listed the approximate percentage of time allocated to various duties at the United States office as:

- Realize the targeted growth - 5 %
- Technical and business management - 20%
- Overseeing marketing and sales operations - 20%
- Forging strategic alliances - 5 %

Day to day management and supervision of affairs including operations, financial aspects, project management, human resource issues, and overall administration - 25 %

Business Development in tune with the targeted growth - 10 %

Supervise Marketing strategy development - 5 %

Any issues that pertain to organizational growth and development - 10 %

The petitioner also provided its organizational chart showing the beneficiary as chief executive officer of the United States operations and directly supervising a chief technical officer and chief operation officer/director of marketing. The unfilled position of chief technical officer supervised unfilled positions of project managers who in turn supervised programmer analysts/architects. The petitioner listed a number of individuals with salaries and a brief description of job duties in the positions of programmer analyst, "do," and system/database administrators. The petitioner indicated one individual was employed as the chief operating officer. The chief operating officer was shown as supervising unfilled positions of sales/marketing manager and one individual in the position of account manager.

The petitioner further provided its California Form DE-6, for the quarter ending December 31, 2001, the quarter in which the petition was filed. The California Form DE-6 showed the petitioner employed seven individuals the first month of the quarter and six individuals the second and third months of the quarter. The only name on the organizational chart or the list of employees that corresponded with a name on the California Form DE-6 is the person identified as the sales/operating manager.

The director determined that the organizational chart was deficient because it did not identify the employees in each listed position. The director also observed discrepancies between the number of positions listed on the petitioner's organizational chart and the number of individuals shown on the petitioner's California Form DE-6. The director further noted that the petitioner was using two different addresses. The director determined, based on the petitioner's payroll records and California Form DE-6 that the petitioner's employees were either not full-time or in temporary positions. The director concluded that the record did not contain sufficient consistent evidence regarding the current and proposed duties of the beneficiary and the job titles and duties of other company employees to establish that the beneficiary would be a manager or executive for immigration purposes.

On appeal, counsel contends that the director failed to consider other possibilities when noting the discrepancies between the petitioner's organizational chart and its California Forms DE-6 and when noting the part-time and temporary employment of the petitioner's employees. Counsel asserts that the beneficiary's job description clearly shows that the beneficiary's job duties are supervisory in nature. Counsel also claims that the petitioner's organizational chart complies with the director's request for further evidence. Counsel asserts that it is not unusual to operate from different locations and that it has always maintained an office in the Santa Clara area. Counsel asserts that the beneficiary will supervise professionals and that the size and nature of the petitioner are irrelevant.

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 provided a broad description of the beneficiary's duties, indicating that the beneficiary would supervise various management areas. The description did not include sufficient details of the beneficiary's daily activities to conclude that the beneficiary's assignment would be in a primarily managerial or executive capacity.

In response to the director's request for evidence, the petitioner indicated that the beneficiary would spend the majority of his time overseeing the marketing and sales operations, on technical and business management, and on day-to-day management and supervision of operations, financial affairs, projects, human resources, and administration of the company. The petitioner's description continues to lack detail regarding the beneficiary's actual tasks and continues to show only that the beneficiary will supervise various management areas. Moreover, the record does not contain supporting documentation that substantiates the petitioner's claim that the beneficiary will supervise or oversee various management tasks. 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's organizational chart and California Forms DE-6 establish that the petitioner employs only the beneficiary and one individual as an account manager to carry out the marketing, sales, technical supervision, human resource supervision, and administration of the petitioner.<sup>1</sup> The petitioner does not identify the positions of six of the employees listed on the California Form DE-6 for the quarter in which the petition was filed. Counsel appears to confirm on appeal that the petitioner no longer employed individuals in the positions of chief technical officer, project manager, sales/marketing manager, or individuals subordinate to these positions. Thus, the record supports only a conclusion that the beneficiary's primary assignment, when the petition was filed, was to perform duties relating to sales, marketing, and the day-to-day administrative operations of 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).

Counsel's claim that the beneficiary's job description clearly shows the beneficiary's job duties are supervisory is also not persuasive. The petitioner's description of the beneficiary's duties suggests that the beneficiary spends his time supervising management affairs. However, as stated above, the petitioner does not provide further detail. It is not possible to discern from the description whether the petitioner is claiming that the beneficiary supervises actual departments or whether the petitioner is claiming that the beneficiary directly supervises technical staff. As noted above, if the petitioner is claiming that the beneficiary supervises, manages, or oversees departments within the organization, the record does not contain evidence that the petitioner has employees, other than the beneficiary, to perform the non-qualifying duties associated with each of the departmental tasks.

If the petitioner is claiming that the beneficiary primarily supervises technical staff, the petitioner has not provided sufficient evidence to establish that the duties required of the technical staff are professional. It is not possible to determine from the brief job descriptions provided for the positions labeled programmer analysts that these positions require professional knowledge. It is possible that these analyst positions only require data entry expertise. Moreover, as previously referenced, the petitioner has not provided verifiable evidence that it employs the individuals listed on the organizational chart in the positions of programmer analysts. On appeal, counsel indicates that the petitioner places technical staff in states other than California and provides a sample of quarterly wage reports showing the employment in other states. However, of the three employees shown

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<sup>1</sup> Although not independently verified by state wage reports, the petitioner's remaining claimed employees are program analysts providing the petitioner's technical services.

on the quarterly wage reports, only one is listed on the petitioner's organizational chart. Furthermore, the organizational charts are inconsistent with the wage reports provided. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and 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 (BIA 1988). The record does not sufficiently establish that the petitioner employed personnel listed in technical positions on the petitioner's organizational chart when the petition was filed.

Counsel contends that CIS should consider other possibilities when noting the discrepancies between the petitioner's organizational chart and its California Forms DE-6 and when noting the part-time and temporary employment of the petitioner's employees. However, it is the petitioner's burden to establish the beneficiary's eligibility for this visa classification. See section 291 of the Act, 8 U.S.C. § 1361. CIS cannot speculate or otherwise base its decision on the myriad number of possibilities regarding the petitioner's failure to produce sufficient and consistent evidence. The director must focus on applying the statute and regulations to the facts presented by the record of proceeding.

Counsel's assertion that the size and nature of the petitioner are irrelevant to this determination is incomplete. Section 101(a)(44)(C) of the Act, requires that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The petitioner was established in July 1999 and when the petition was filed in December 2001 could proffer evidence of employing the beneficiary, an account manager, and four or five other individuals in undisclosed positions. The petitioner did not provide independent evidence of whom in its organization would perform the day-to-day operational and administrative tasks. As such, it is not possible to determine from the record that the reasonable needs of the petitioner could plausibly be met by the services of the staff on hand when the petition was filed.

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.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$60,000 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.

The petitioner has not provided evidence that it has paid the beneficiary the proffered wage of \$60,000 in the past. The petitioner's Internal Revenue Service (IRS) Form 1120 for the petitioner's fiscal year ending in March 2001 shows that the beneficiary was not compensated and that the petitioner had a negative net income of \$3,260. When considering the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this matter, the petitioner has not established its ability to pay the proffered wage. For this additional reason the petition will not be approved.

In addition, the petitioner has presented contradictory information to its claim that it is a branch office of a foreign corporation. As noted above, the petitioner filed IRS Forms 1120 when reporting its income. However, a foreign corporation must file IRS Form 1120-F. In this matter, the petitioner states that it is a branch office of a foreign corporation and as such has not issued stock. However, the petitioner's IRS Form 1120 on Schedule L at Line 22(b) indicates that the petitioner has issued common stock valued at \$59,945 at the beginning of the 1999 fiscal year and valued at \$122,745 at the end of the 1999 fiscal year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and 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, supra.*

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.