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

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ADMINISTRATIVE APPEALS OFFICE
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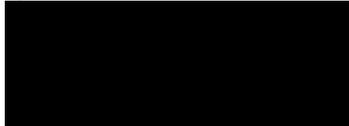
OCT 10 2003

File: WAC 02 200 50460 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:



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

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 company organized in January 2001 in the State of California. It is engaged in providing technology services and is involved in real estate investment. It seeks to employ the beneficiary as its president and executive director. 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 would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel contends that the petitioner provided sufficient evidence to establish that the beneficiary was employed in an executive and managerial capacity.

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 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 on its Form I-140, Immigrant Petition for Alien Worker that the beneficiary would "direct, supervise and oversee the day to day operations of company." The petitioner also stated in an undated letter that the petitioner employed the beneficiary, an office manager, and two sales associates in 2001 and that its current list of employees included the beneficiary, a business analyst, an office manager, two sales associates, and a software engineer.

The petitioner also provided its California Forms DE-6, Employer's Quarterly Wage Report for the quarter preceding the filing of the petition. The petitioner's California Form DE-6 for the quarter ending March 31, 2002 that was signed on March 31, 2002 showed the petitioner had paid the beneficiary and the person identified as the business analyst in that quarter. The petitioner's California Form DE-6, also for the quarter ending March 31, 2002 but signed on April 27, 2002 showed the petitioner had paid the individuals identified as the office manager and the sales associates. Neither California Form DE-6 for the quarter ending March 31, 2002 included the individual identified as the software engineer.

The director requested additional evidence to establish that the beneficiary's primary assignment would be in an executive or managerial capacity. The director specifically requested the petitioner's recent California Forms DE-6, Quarterly Wage Reports and descriptions of the job duties for all employees under the beneficiary's supervision.

The petitioner listed the beneficiary's duties as:

- To implement the strategic goals and objectives of the organization
- In consultation with the overseas corporation enable the governance function
- To give direction and leadership toward the achievement of the organization's philosophy, mission, strategy, and its annual goals and objectives

- Co-ordinate sales and marketing, promotion, delivery and quality products and services
- Establish yearly budget for organizational operations and prudently manages organization's resources within those budget guidelines according to current laws and regulations
- Effectively manages the human resources of the organization according to authorized personnel policies and procedures that fully conform to current laws and regulations.

The petitioner also listed four full-time employees currently under the beneficiary's supervision, including two software developers, a vice-president of business development, and a marketing analyst. The petitioner also indicated that it currently employed one part-time software developer and used the services of one outside contractor. The petitioner noted that it had previously employed two part-time sales associates and a part-time marketing analyst and had previously used the services of five software developers through outside agencies.

The petitioner also submitted its California Form DE-6 for the quarter in which the petition was filed. The California Form DE-6 showed three employees, the beneficiary, a marketing analyst, and a software developer. The petitioner also provided California Form DE-542, Report of Independent Contractors dated January 25, 2002. The report listed the individual identified by the petitioner as its part-time marketing analyst.

The director determined that the petitioner's job description for the beneficiary's duties did not establish that the position was either a managerial or executive position or that the petitioner was sufficiently complex to warrant an employee in a managerial or executive position. The director also determined that with the petitioner having only two or three employees the beneficiary would be assisting in numerous non-executive/managerial tasks. The director further determined that the petitioner had not submitted evidence to establish that the beneficiary was a first-line supervisor over professional employees or was a functional manager.

On appeal, counsel asserts that the petitioner submitted evidence of six employees, including the beneficiary. Counsel also asserts that two of the employees, namely, a software engineer and the business analyst, hold bachelor degrees. Counsel asserts further that the petitioner regularly uses the services of software developers on an independent contractor basis and that these contractors are professionals with specialized degrees. Counsel concludes by stating that the beneficiary provided evidence that she managed not only essential functions within the organization but managed and supervised at least two employees in

professional positions. Counsel also contends that the director erred when determining the petitioner was not sufficiently complex to warrant the services of a manager or executive. Counsel contends that the petitioner is engaged in providing information technology services, a business that would not require more than two employees to execute the routine, day-to-day tasks associated with office management.

The AAO notes that the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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 is both an executive and a manager.

Counsel's assertions are not persuasive. 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 provides a broad description of the beneficiary's duties. The job description is not comprehensive and fails to provide an understanding of the nature of the beneficiary's daily activities. It is not possible to discern whether the beneficiary is primarily performing duties that are managerial or executive duties or is primarily performing operational, administrative, or supervisory tasks. 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).

For example, the petitioner states that the beneficiary co-ordinates sales and marketing, promotion, and delivery of quality products and services. However, when the petition was filed, the petitioner provided independent evidence of the employment of the beneficiary, a software developer, and a marketing analyst. The petitioner had previously employed sales associates but apparently did so no longer. The record does not confirm that the petitioner had employees, other than the beneficiary, to perform the sales and promotional duties 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).

Likewise, the beneficiary's duties relating to the preparation of the budget and managing resources are not necessarily executive or managerial duties for immigration purposes. The petitioner does not provide independent evidence of the employment of other

individuals who perform the necessary operational and administrative tasks associated with preparing and managing the budget, relieving the beneficiary's, or at least limiting the beneficiary's, involvement in the non-qualifying tasks related to this duty. Further, the beneficiary appears to be the only supervisor within the organization to manage the petitioner's human resources. 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. See section 101(a)(44)(A)(iv) of the Act.

The record does not substantiate counsel's assertion that the beneficiary supervised two employees in professional positions and contractors in professional positions. 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 not provided a sufficient description of the duties of the claimed professional positions to establish that the duties associated with the positions are professional. A position identified as "software developer" may encompass primarily professional duties, but may also be only a technical position. Titles do not sufficiently convey the professional nature of a position. Of further note, the petitioner has not provided independent evidence that it employed independent contractors when the petition was filed.

Counsel's assertion that the beneficiary manages several essential functions is also 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). In addition, if the petitioner claims that the beneficiary is managing an essential function, the petitioner 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. Further, 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 case, the petitioner has not provided evidence that the beneficiary manages essential functions.

Moreover, the record fails to substantiate counsel's assertion that the beneficiary performs in an executive capacity. Counsel asserts that the petitioner is sufficiently complex to require the services of a manager and an executive. As previously noted, however, the petitioner does not provide an adequate description of the beneficiary's daily duties and the petitioner has not provided sufficient documentary evidence that it employs sufficient

personnel to relieve the beneficiary from primarily performing non-qualifying duties. Again, as noted previously, 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.*

In sum, the petitioner has not provided sufficient evidence to establish the beneficiary's primary assignment for the petitioner will be in a managerial or executive capacity. The descriptions of the beneficiary's job duties are general and fail to describe day-to-day duties of a manager or executive.

Beyond the decision of the director, the petitioner has provided contradictory information concerning its qualifying relationship with the beneficiary's overseas employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The petitioner was incorporated in January 2001 and began doing business in May 2001. The petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for its fiscal year beginning December 2000 and ending November 30, 2001 shows

that the beneficiary is the 100 percent owner of the petitioner's outstanding shares. The petitioner also provided stock certificates, numbered 2, 3, 4 and 5 issued to "[the beneficiary] in proxy for [an individual] of [the beneficiary's overseas employer]." The number of shares issued on the four stock certificates totaled 20,000. The petitioner also provided copies of operating agreements between the beneficiary and the four different individuals identified on the stock certificates. The operating agreements gave the four individuals the beneficiary's proxy to vote the beneficiary's shares in the petitioner for six years, ending June 25, 2007. The four individuals given the beneficiary's proxy to vote the petitioner's shares are the individuals identified by the petitioner as the owner of the beneficiary's overseas employer.

The petitioner does not provide stock certificate number one, nor does the petitioner explain its absence. The petitioner does provide evidence of a wire transfer from the beneficiary's overseas employer to the beneficiary's personal account in the amount of \$20,000.

The evidence contained in the record raises concerns regarding the qualifying relationship between the petitioner and the beneficiary's overseas employer. It appears that the beneficiary is attempting to establish a qualifying relationship between the petitioner and her overseas employer for a limited amount of time (six years) in order to qualify for this visa classification. Such an attempt undermines the requirements of this classification and is not treated favorably. Without a reasonable explanation of the business purpose for the transfer of control of the petitioner for a limited period of time, the petitioner has not established a qualifying relationship with the beneficiary's overseas employer.

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.