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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
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**OCT 16 2003**

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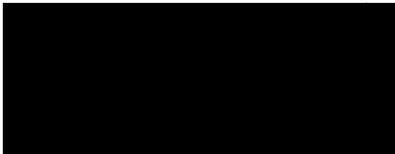
Date:

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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company incorporated in July 2000 in the State of Delaware. It is engaged in business-to-business e-commerce and owns and operates two web sites. It seeks to employ the beneficiary as its 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 would be employed in a managerial or executive capacity for the petitioner. The director also determined that the beneficiary had not been employed in an executive or managerial capacity for a foreign entity for one year prior to entering the United States as a non-immigrant.

On appeal, counsel submits evidence and asserts the evidence demonstrates that the beneficiary supervises professional workers both in the United States and India.

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 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's responsibilities included:

[A]nalyzing, enhancing and directing the implementation of marketing plans and strategies to increase the Company's profile and create new business opportunities. He oversees and coordinates activities and efforts to create business partnerships with U.S. companies to increase traffic to the web sites and generate a higher volume of transactions. He directs and manages the staff of [the petitioner] and offers training as to future business and marketing operations, strategies and incentives. He presides at senior managerial/executive meetings to establish corporate policies and delineate corporate goals and objectives within the [claimed parent company's group's] philosophy for doing business.

The petitioner also indicated that the beneficiary would be integrating support staff in India and proprietary customer lists and business products offered by the claimed parent company's group with the products and services offered by the petitioner. In addition, the petitioner indicated that the beneficiary would install a team of mid-level managers, project leaders, and sales/marketing/business operations personnel in the United States under the beneficiary's supervision. The petitioner concluded by indicating that the beneficiary was given wide latitude in rendering final management and executive decisions, that he devoted the overwhelming majority of his time to senior managerial/executive duties, and delegated day-to-day tasks to subordinate mid-level managers.

The petitioner also submitted its initial Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the period starting July 21, 2000 and ending June 30, 2001. The IRS Form 1120 showed that the beneficiary had been paid \$53,500 and salaries and wages had been paid in the amount of \$171,985. The petitioner also submitted its New Jersey Form-927, Employer Quarterly Wage Report for the quarter ending June 30, 2001

showing that the petitioner employed seven people, including the beneficiary.

The director requested additional evidence to establish that the beneficiary would be primarily performing managerial or executive duties for the petitioner. The director specifically requested the number of subordinate supervisors, the job titles and job duties of the employees and how much time the beneficiary would spend on executive/managerial functions. The director also requested the number of hours devoted to each of the beneficiary's job duties on a weekly basis.

In response, the petitioner through its attorney indicated that the petitioner had expanded the staff of the petitioner to six employees, identified niche markets for the company to pursue, secured office and warehouse premises, and implemented business operations and strategies linking the petitioner with the claimed parent company's group in India. Counsel also indicated that the beneficiary formulated and implemented goals and strategies, rendered all final managerial and executive decisions, hired all existing staff, and presided over managerial and executive meetings. Counsel indicated that the beneficiary devoted approximately 30 percent of his time to staff meetings providing instruction to the staff; and, approximately 35 percent of his time analyzing market conditions, sales figures and business operations. Counsel further indicated that the beneficiary spent approximately 15 percent of his time interacting with executives, managers, and subordinate personnel reporting to him from the claimed parent company's group and 10 percent of his time serving as a liaison to vendors, suppliers, and business partners.

The petitioner also provided its organizational chart showing a president, a vice-president of sales and marketing, a business/financial analyst, two programmers, and a customer service representative. The petitioner's New Jersey Form-927, Employer Quarterly Wage Report for the quarter in which the petition was filed showed that the petitioner employed three individuals including the beneficiary.

The director determined that there was no clear indication in the record to show the complexity of the beneficiary's daily duties or to show that he was not primarily engaged in the actual sales, development, and marketing activities of the petitioner. The director also determined that the record did not contain evidence to show that the individuals subordinate to the beneficiary were employed in professional positions. The director concluded that the petitioner had not provided sufficient evidence to establish that the beneficiary would primarily be engaged in a managerial or executive capacity.

On appeal, counsel submits a list of names, job titles and brief descriptions of employees, both for the overseas entities and the petitioner. Counsel also provides evidence that several of the

claimed employees hold bachelor degrees. Counsel asserts that the subordinate employees hold positions of finance manager, systems manager, database administrator, software engineer, business process manager, marketing executive, technical executive, financial controller, director of strategic planning, and director of operations. Counsel asserts further that CIS routinely regards these positions as professional positions. Counsel also asserts that the beneficiary does not perform the functions of a market research analyst but oversees and manages other personnel who perform this function. Counsel contends that the beneficiary meets the definition of both a manager and an executive.

Counsel claims that the beneficiary is engaged both in managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section 101(a)(44)(B) of the Act. However, 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 and evidence 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 from the description alone, whether the beneficiary is primarily performing duties that are managerial or executive duties or is primarily performing operational 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).

The record does not substantiate that the beneficiary supervises employees holding 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). For example, counsel provided no supporting documentation to confirm the petitioner's assertion that the beneficiary's proposed job title and description qualify the position as professional. The petitioner's claim that the beneficiary has the organizational skills to ensure strong client rapport is similarly undocumented; consequently, the assertion of organizational skills cannot show

that the beneficiary will serve in a professional position. Moreover upon examination of the record, the record does not show that the vice-president of sales supervises other sales personnel. These facts suggest that the vice-president of sales is directly engaged in sales.

The record does not provide a clear understanding of the petitioner's number of employees, their particular job duties, and their role in the structure of the organization. The petitioner employed seven individuals intermittently in the year 2001. When the petition was filed, the petitioner's New Jersey Form-927 showed that the petitioner employed only the beneficiary and two other employees. One of the employees was identifiable as the vice-president of sales. The other employee could not be associated with a particular position. The record does not contain sufficient evidence that the petitioner employed individuals in professional positions subordinate to the beneficiary when the petition was filed. Nor does the record show that the petitioner employed individuals who performed the market research functions 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 also has not provided sufficient evidence to establish that the beneficiary is actively supervising employees of the overseas entities. Again, going on the record without 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 second issue in this proceeding is whether the petitioner has established that the beneficiary was employed in a managerial or executive capacity for a qualifying entity prior to the beneficiary's entry into the United States as a non-immigrant. The petitioner states that the beneficiary was a senior manager and executive for the overseas entity and was involved in developing business opportunities, managing a staff of 20 to 30 including mid-level managers and professionals, as well as, committing a significant amount of time to acquiring the petitioner. The petitioner, through its counsel, indicated the beneficiary met with vendors, negotiated deals, developed new business opportunities, coordinated business operations, as well as, researching and exploring business contracts and strategic relationships.

The director determined that the petitioner had not provided sufficient evidence to demonstrate that the beneficiary was

primarily engaged in the managerial or executive aspect of performing various duties for the overseas entity rather than performing the actual duties associated with the tasks described.

On appeal, counsel submits several pages listing the overseas entity's claimed employees. The petitioner does not present documentary evidence of the actual employment of these individuals. It is not possible to determine from the information submitted when the overseas entity employed these individuals or the role each individual played in the various organizations comprising the overseas entity's group. The record does not contain sufficient evidence to overcome the director's determination that the beneficiary did not primarily perform in an executive or managerial capacity for the overseas entity.

Beyond the decision of the director, the petitioner has provided confusing information concerning its qualifying relationship with the beneficiary's overseas employer. See 8 C.F.R. § 204.5(j)(2). The petitioner provides a bill of sale, an agreement of purchase and sale, and copies of the petitioner's stock certificates to establish a qualifying relationship. The stock certificates show 1,050,000 shares of the petitioner's stock have been issued to an overseas entity, Golden Gate Infotech, Ltd., and 450,000 shares have been issued to Buydeal International, Ltd, a California company. The petitioner does not provide evidence that it was actually paid for the issuance of stock. Moreover, the amount of stock issued does not correspond with information contained in the bill of sale and the agreement of purchase and sale. Thus, the record does not clearly establish a qualifying relationship between the beneficiary's overseas employer and the petitioner. 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). For this additional reason the petition will not be approved.

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.