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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



OCT 16 2003

File: WAC 02 191 51211

Office: CALIFORNIA SERVICE CENTER

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, 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 1982 in the State of Delaware. It is a provider of products, services, and support solutions for building and maintaining network computing environments. It seeks to employ the beneficiary as its Asian Pacific pricing and product announcement 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 manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel contends that the beneficiary clearly meets each of the criteria of the statutory definition of managerial capacity and that the director erred in its decision.

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 duties for the petitioner. The petitioner does not contend that the beneficiary's primary assignment will be in an executive capacity.

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 initially stated that the beneficiary would be directing an essential function, specifically overseeing the development of a framework through which Asian and Pacific (APAC) pricing is automatically set. The petitioner indicated that the beneficiary's duties to carry out this essential function would include:

- Oversee the configuration of new products and provide feedback to the product development group;
- Direct the effort to assign pricing to new products;
- Oversee the development of guidelines for pricing in the APAC region;
- Manage the orderability (quoting, booking, and invoicing) of new products from a order administration system perspective;
- Lead the effort to improve business processes across APAC subsidiaries; and
- Represent the APAC region for all multinational business programs.

The director requested further evidence to establish that the beneficiary would be performing managerial or executive duties for the petitioner. The director specifically requested the petitioner's line and block organizational chart, identifying the beneficiary's position on the chart and listing all employees under the beneficiary's supervision by name and job title. The director also requested a brief description of job duties for the beneficiary and all employees under the beneficiary's supervision.

In response, the petitioner provided its organizational chart showing the beneficiary reporting to the director of field operations who in turn reported to the vice-president of sales operations. The organizational chart also showed seven positions identified as business operations managers reporting to the beneficiary. Each business operations manager covered a particular area in the Asia/Pacific region. The petitioner did not provide a job description for the position of business operations manager.

The petitioner also provided the percentage of time the beneficiary spent on various duties. The petitioner stated that the beneficiary spent 20 percent of his time facilitating and leading APAC pricing decisions, 35 percent of his time designing and managing APAC new product announcement processes, 30 percent of his time on parts and system management, 10 percent of his time driving "APAC GSO/ES integration architecture," and 5 percent of his time on the APAC Passport project. The petitioner also provided more information detailing tasks associated with these duties.

The director determined that the beneficiary's seven subordinates were all located in different countries therefore, "no literal supervision is taking place." The director also selected three tasks of the more than 15 tasks detailed and stated that the three tasks did not "sound like management duties." The director concluded that the petitioner had not established that the

beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary has managed, and is managing, a team of professional level engineers. Counsel also indicates that the beneficiary "is 'literally' supervising his team in that he provides direction, project assignments, and performance reviews for each and every individual on his team." Counsel also asserts that the director erred in randomly selecting a management level for the beneficiary when the law does not require a certain management level to fulfill the criteria of a "manager" for immigration purposes. Counsel asserts that the three tasks identified by the director as non-managerial duties, are tasks that are unrelated to the beneficiary's position. Counsel asserts that the director erred by applying the wrong job duties to this petition and by not considering the description of job duties initially provided by the petitioner. Counsel asserts the beneficiary manages a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, has authority to hire and fire and recommend personnel actions, and exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

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 initially indicated the beneficiary would oversee a pricing function. In carrying out this duty the beneficiary engaged in several tasks, including providing feedback, developing pricing guidelines, improving business processes, representing the Asian/Pacific region, and managing "orderability." It is not possible to discern from the petitioner's statements about the beneficiary's various duties whether the beneficiary would be managing a particular function, carrying out the operational tasks associated with a particular function, or supervising other individuals in carrying out operational tasks.

The director, thus, requested further evidence of the beneficiary's role in the organization. The petitioner's response allocated the beneficiary's various duties into tasks associated with pricing decisions, new product announcements, systems management, and other integration architecture and projects. Although the information provided was lengthy, the petitioner did not explain how the beneficiary's tasks were primarily managerial tasks rather than the performance of necessary operational duties. 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).

On appeal counsel focuses on the beneficiary's supervision of seven individuals and asserts that these individuals are professional employees. However, the record does not contain documentary evidence of the nature of or duties associated with the positions subordinate to the beneficiary. 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 record does not substantiate that the beneficiary supervises individuals holding managerial, supervisory, or professional positions.

Counsel's statement that the beneficiary provides direction, project assignments, and performance reviews is indicative of an individual supervising a staff. However, as stated previously the petitioner has not provided independent evidence that the positions subordinate to the beneficiary are professional positions. Section 101(a)(44)(B)(iv) of the Act provides that a first-line supervisor must supervise employees holding professional positions to be considered acting in a managerial capacity for immigration purposes. Moreover, contrary to counsel's assertion, section 101(a)(44)(A) of the Act requires a beneficiary whose primary assignment is to oversee a staff, to supervise and control employees who are, themselves, managerial, supervisory, or professional employees.

Counsel also refers to the petitioner's initial description of the beneficiary's duties and implies that the beneficiary is managing an essential function. A beneficiary may be considered a manager of an essential function even if the beneficiary does not supervise or control a staff of managerial, supervisory, or professional employees. However, when a petitioner claims that the beneficiary is or will be 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. 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 sufficient evidence to establish that the beneficiary manages an essential function.

Counsel's assertion that the director failed to apply the petitioner's job description of the beneficiary's duties when adjudicating this petition is incorrect. The director identified three tasks in the beneficiary's job description submitted in

response to the request for evidence and noted that these tasks were non-managerial duties. However, the director did not indicate that the beneficiary spent less than 15 percent of his time performing the tasks the director identified. However, as previously stated, the complete description provided in response to the director's request for evidence does not provide a clear understanding of the beneficiary's daily duties and how the duties described comprise primarily managerial duties, rather than operational duties.

In sum, the petitioner has not provided sufficient evidence to establish the beneficiary's primary assignment for the petitioner will be in a managerial capacity as defined by section 101(a)(44)(A) of the Act. The descriptions of the beneficiary's job duties do not provide a clear understanding of the beneficiary's daily duties. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary will be employed in a primarily managerial capacity.

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.