

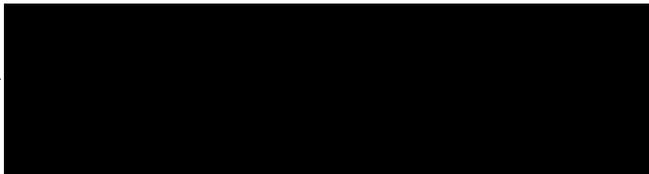
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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BY

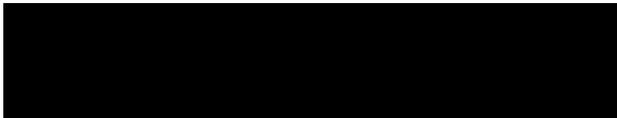
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



OCT 16 2003

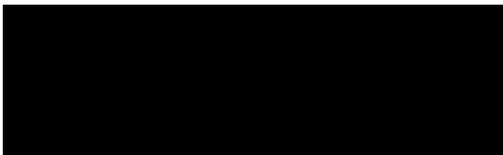
File: WAC 02 175 51782 Office: CALIFORNIA SERVICE CENTER Date:

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 non-profit shippers association established in 1969. It is engaged in handling international and domestic freight movements for its approximately 4000 members. It seeks to employ the beneficiary as its international shipping 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 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 director's decision is in error and that the beneficiary will be employed in a managerial or executive capacity for the petitioner.

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 that the beneficiary's duties included:

- Direct and coordinate international activities of shipping company;
- Coordinating and preparing reports for head quarters [sic] in China and the parent company in Los Angeles;
- Analyze rate, costs and revenues to determine the method by which to reduce operating costs and expand or change schedules/routes;
- Recommend methods to increase efficiency and revenues and lower costs;
- Consult with officials on traffic movement problems, such as shipment handling, transfers and in-transit storage;
- Direct and coordinate activities of regional workers in shipments and in applying and enforcing rates;
- Direct through sub-ordinate [sic] management personnel workers compliance with established company policy, procedures and standards;
- Inspect regional premises and terminals for conformance, repair, or maintenance needs, and to ensure adequate protection exists for company assets, property and equipment.

The director requested further evidence to establish that the beneficiary would be performing the duties of a manager or executive for the petitioner. The director specifically requested the petitioner's organizational chart including the names, job titles, and description of job duties for all the employees under the beneficiary's supervision.

In response, the petitioner explained that the beneficiary's position was a new position and that no existing personnel structure would be in place until the beneficiary began his job duties. The petitioner added that the beneficiary's position would be a managerial position on the organizational chart and that the United States business would reorganize the personnel structure to satisfy the beneficiary's described job duties. The petitioner re-stated the beneficiary's job description previously provided and asserted that the beneficiary's proposed position placed substantial management and professional personnel under his direct supervision, personnel that would be assigned once the beneficiary began his job duties. The petitioner also asserted that the beneficiary's position as international shipping manager would be the manager of an essential function.

The director determined that the beneficiary was required to be a manager or executive over subordinate employees. The director also determined that CIS did not consider a person to be a manager if the person had no subordinates. The director noted that the position of "manager" of a "new office" applied only in non-immigrant classifications.

On appeal, counsel for the petitioner asserts that the director's denial was erroneous because immediately upon assuming the international shipping manager position the beneficiary would be employed in a manager/executive position supervising seven employees. Counsel provides an organizational chart showing seven positions within the new organizational structure that would report to the beneficiary's position. Counsel also provides names, titles, and brief job descriptions for the seven positions that would fall under the beneficiary's supervision once he assumed the international shipping manager position. Counsel asserts further that the description of the beneficiary's job duties illustrate that the beneficiary's proposed position places substantial management and professional responsibility and personnel under his direct supervision.

Counsel's assertions are not persuasive. The AAO notes 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.

The AAO further notes that the director erroneously stated that the beneficiary was required to have subordinate employees to qualify as a manager for immigration purposes. Under the statute, an individual need not supervise employees to be classified as a

manager. Instead, the individual may manage an essential function and function at a senior level within the organizational hierarchy or with respect to the function managed. Besides managing an essential function and functioning at a senior level, the individual must, however, meet the remaining criteria of the managerial capacity definition.

Although counsel on appeal does not elaborate upon the petitioner's claim that the beneficiary's proposed position would be a functional manager position, the AAO will address petitioner's claim. If a petitioner claims that a beneficiary is a functional manager, the petitioner must identify the function managed by the beneficiary 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 did not adequately identify the function that the beneficiary would manage. The petitioner did not describe the essential nature of the function and did not submit evidence that the beneficiary managed the function rather than providing necessary operational services for the petitioner. The petitioner did not provide evidence that the beneficiary would manage an essential function. 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).

Counsel's submission of an organizational chart and descriptions of duties for individuals that the beneficiary would supervise is not persuasive. The director specifically requested evidence of the managerial capacity of the beneficiary in his request for additional evidence. The director requested an organizational chart and the titles and nature of the positions under the beneficiary's supervision. The petitioner had an opportunity to provide this information and any appropriate explanations to the director. When the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 has consistently provided the same description of the beneficiary's

proposed duties for the petitioner. However, the description provided is more indicative of an individual providing operational services to the petitioner. The petitioner indicates that the beneficiary will prepare reports, analyze data, consult with officials on traffic movement problems, and inspect premises for conformance, repair, or maintenance needs. It is not possible to conclude that these duties are primarily managerial duties rather than the performance of necessary operational tasks of the position. 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 indication that the beneficiary will coordinate regional workers or will direct subordinate managerial personnel was not substantiated in the record before the director. As previously stated, 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*. Moreover, 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).

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.