

PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

BY

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

[REDACTED]

OCT 16 2003

File:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
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:

[REDACTED]

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 May 2000 in the State of California. It is engaged in international trading. 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. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel asserts that the director erred when determining that the beneficiary would not be acting in a managerial capacity and erred when finding that a qualifying relationship did not exist.

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 in its letter in support of the petition that the beneficiary would be responsible for "planning, developing and establishing policies and objectives of the US Company." The petitioner also stated that the beneficiary would "direct and coordinate all of the international trading activities of the US Company." The petitioner further stated that the beneficiary would promote the company within the local industry and trade association. The petitioner finally indicated that the beneficiary reviewed performance evaluations and had the authority to hire and fire personnel. The petitioner also submitted its California Form DE-6, Employer's Quarterly Wage Report for the quarter ending June 30, 2001. The California Form DE-6 showed that the petitioner employed four full-time employees, including the beneficiary and four part-time employees.

The petitioner also submitted its organizational chart showing the beneficiary as president, a vice president, three employees in the international trade division, and three employees in the information technology division.

The director requested a more detailed description of the beneficiary's duties, including a list of all employees under the beneficiary's direction and the percentage of time the beneficiary spent on his various duties. The director also requested the petitioner's organizational chart, requesting that it include the names, job titles, and job descriptions for the employees under the beneficiary's supervision.

In response, the petitioner provided a revised organizational chart showing the beneficiary as president, a vice-president, an information technology division with two employees, and an international trade division with four employees. The petitioner's California Form DE-6 for the quarter in which the petition was filed confirmed the employment of seven of the individuals depicted on the petitioner's organizational chart and the employment of an individual on a part-time basis who was not listed on the organizational chart.

The director sent a second request for further evidence. The director requested that the petitioner submit its organizational

chart and include brief descriptions of the job duties of each employee on the chart.

In response, the petitioner submitted a second revised organizational chart showing the beneficiary as president with four divisions reporting directly to him. The four divisions included a sales division with three employees (one employee designated as the manager), a consultant division with two employees (one employee designated a manager, the second employee was not depicted on the California Form DE-6), a research division with one employee identified as a manager, and an office/administrative division with one employee.

The petitioner described the duties of the president as "direct[ing] and coordinat[ing] activities of the company. The manager of the sales division was identified as involved in international trade development. The manager of the research division was identified as involved in product development and market research. The manager of the consultant division was identified as involved in planning, designing, and consulting business. The two employees of the sales division were involved in sales and the office clerk provided secretarial services.

The director noted that the petitioner had not specified whether the beneficiary would be employed in primarily a managerial capacity or primarily in an executive capacity. The director also noted that the initial job description for the beneficiary was similar to another job description submitted by the same counsel for a beneficiary of another petitioner. The director determined that the job descriptions provided with the petitioner's third organizational chart did not demonstrate that the beneficiary would have managerial control and authority over a function, department, subdivision or component of the company; and further did not demonstrate that the beneficiary would manage a subordinate staff of professional, managerial or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The director also determined that it was reasonable to believe with the organizational structure of the petitioner that the beneficiary would be involved in day-to-day non-supervisory duties. The director further determined that the beneficiary would not qualify as a "manager" because the beneficiary's position was a first-line manager position over non-managerial and non-professional employees.

On appeal, counsel for the petitioner asserts that the beneficiary's duties are clearly managerial in nature. Counsel states that the beneficiary reviews activity reports and financial statements to determine financial progress. Counsel asserts that the beneficiary spends 30 percent of his time directing and coordinating the formulation of financial programs to provide funding for new or existing operations, 20 to 30 percent of his time supervising subordinate managerial staff, and 20 percent of his time hiring and training new personnel. Counsel

avers that the employees under the beneficiary's supervision are professional employees. Counsel finally alleges that the beneficiary's duties are substantially all at the managerial or executive level in light of the size and age of development of the company.

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's initial description of the beneficiary's duties was general and primarily paraphrased elements of the statutory criteria of both managerial and executive capacity. See sections 101(a)(44)(A)(iii) and 101(a)(44)(B)(i) and (ii) of the Act. Such statements do not provide an understanding of the beneficiary's actual daily duties. In addition, the petitioner's statement that one of the beneficiary's primary duties was to promote the company is more indicative of an individual providing an operational service for the company. 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 provide sufficient information to substantiate that this duty is primarily a managerial or executive duty.

The petitioner has provided evidence that it employs seven individuals in addition to the beneficiary. However, the petitioner has not provided adequate descriptions of the job duties for the individuals under the beneficiary's supervision. The job descriptions and the organizational chart are insufficiently detailed to allow a conclusion that the beneficiary is relieved from primarily performing non-qualifying duties. It is not possible to determine from the information provided that the employees under the beneficiary's supervision hold professional, supervisory, or managerial 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).

Counsel's assertion concerning the percentages of time the beneficiary spends on various vaguely articulated duties also is 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).

Counsel is correct that the number of the petitioner's employees should be considered in the context of the size, nature, and stage of the petitioner's business. However, when reviewing the petitioner's description of the beneficiary's daily duties and

the duties of the beneficiary's subordinate employees it is not possible to conclude that the beneficiary would be relieved from primarily providing operational services to the petitioner. The petitioner has not established that the beneficiary's assignment fulfills the criteria of an assignment primarily in a managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

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

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 provided a copy of a wire transfer from the beneficiary to the petitioner to substantiate the qualifying relationship between the petitioner and the beneficiary's overseas employer. The director determined that the petitioner's 2000 and 2001 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, did not reflect the claimed investment by the beneficiary's overseas employer. The director also noted that the money to capitalize the petitioner originated from the beneficiary and not the beneficiary's overseas employer.

On appeal, counsel for the petitioner asserts that the beneficiary executed the check to purchase the shares of the petitioner in his capacity as president of the foreign entity.

Counsel's assertion is not persuasive. The petitioner has not provided substantiating documentation that the wire transfer was made on behalf of the beneficiary's overseas employer rather than the beneficiary. 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, the petitioner has not explained the inconsistency created by its IRS Forms 1120 as noted by the director. 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).

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.