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Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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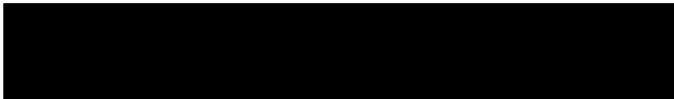
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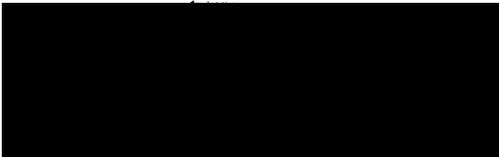
Date:

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, 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 limited liability company organized in December 2001 in the State of California. The petitioner is the successor-in-interest to a California corporation that was also wholly owned by the petitioner's parent company. It is engaged in investing in American companies, exporting semiconductor products, and providing consulting services. 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 had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary directs the investment of over \$4,000,000 in Silicon Valley companies and the export of semiconductor products from the United States to China. On appeal, counsel asserts that the director's decision is arbitrary and capricious and that the beneficiary will have managerial control and authority over a function, department, subdivision, or component of the company.

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 has been and will be performing primarily executive or managerial 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 would occupy the executive/managerial position of president. The petitioner stated the beneficiary's duties as:

[H]e will supervise, direct and control the corporation's business and its officers and employees, including the right to employ, discharge and prescribe the duties and compensation of all officers, employees and agents of the corporation, and establish goals and policies of the organization. At all times, he will exercise wide latitude in discretionary decision making, with respect to: seeking, evaluating and executing investment opportunities; exporting products to China; performing and overseeing consulting services to American semiconductor related companies who are interested in selling their products to China.

The petitioner indicated on its Form I-140, Immigrant Petition for Alien Worker, that the United States entity employed three people. The petitioner also provided its California Form DE-6 for the quarter ending March 31, 2002 confirming the employment of the beneficiary and two other individuals.

The director requested additional evidence to establish the managerial or executive capacity of the beneficiary. The director specifically requested the petitioner's organizational chart identifying the beneficiary's position and the positions of all employees under the beneficiary's supervision. The director also requested a brief description of the beneficiary's subordinate employees' names, titles, job duties, educational levels, and sources of remuneration.

In response, the petitioner provided its organizational chart. The organizational chart showed the beneficiary's position as president, and the two individuals listed on the petitioner's California Form DE-6 as chief financial officer and manager of investment and project cooperation administration. The

organizational chart also showed individuals employed in the positions of executive vice-president, manager of the trading department, and investment analyst. The organizational chart also contained a note that the petitioner used an accounting firm to provide financial consulting services.

The director determined that the petitioner's description of the beneficiary's job duties did not establish that the beneficiary would be employed in a job position comprising primarily managerial or executive duties. The director also determined that the record did not reveal an organization sufficiently complex to warrant an executive or manager. The director further determined that it was reasonable to believe based on the structure of the organization that the beneficiary would be assisting in the performance of non-qualifying duties. The director also concluded that the beneficiary was a first-line supervisor of non-professional employees. Finally, the director determined that the petitioner had not established that the beneficiary would be a functional manager.

On appeal, counsel cites a number of unpublished decisions. However, unpublished decisions are not binding on CIS in its administration of the Act. See 8 C.F.R. § 103.3(c). The petitioner must establish that the facts of the instant petition sufficiently convey an understanding of the beneficiary's duties coupled with substantiating documentary evidence that the beneficiary's assignment is primarily executive or managerial.

In this matter, neither counsel nor the petitioner clarifies whether the beneficiary is claiming to be engaged primarily 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. Instead, 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 asserts that the petitioner has established contacts and a presence within the exporting semiconductor industry and that it is engaged in contractual and consulting relationships with American semiconductor related companies. Counsel states that the petitioner had a net income of \$9,492,650 in December 2001. Counsel asserts that it is common business practice for such an organization to require an executive.

Counsel's assertions are not persuasive. The petitioner has provided evidence that the beneficiary has made investments on behalf of the petitioner. However, the record does not contain documentary evidence that the petitioner engages in the export of semiconductor products. Furthermore, the record contains no

documentary evidence that the beneficiary negotiates contracts to export semiconductor products or provides consulting services. 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). 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 fact that the beneficiary has made investments on behalf of the petitioner is not sufficient to establish that the beneficiary is primarily performing executive or managerial tasks for the petitioner, rather than acting as an investment advisor to the petitioner. The record does not establish that the nature of the petitioner's business necessarily requires an executive or manager or that the beneficiary is primarily providing an executive or managerial service as defined by immigration regulations.

Counsel also asserts that the beneficiary's time is primarily devoted to executive/managerial duties. 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 initially indicated that the beneficiary would oversee the business, would seek, evaluate, and execute investment opportunities, and would perform and oversee consulting services. This description is more indicative of an individual performing the services of an investment analyst or consultant, instead of performing managerial or executive 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).

Moreover, the petitioner has provided documentary evidence that it employed only an administrative assistant and a financial officer in addition to the beneficiary 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 description of duties for these two positions does not support a conclusion that the beneficiary would be relieved from primarily performing the investment analysis and consulting services that appears to be the primary business of the petitioner.

Counsel also contends that the beneficiary will have managerial authority and control over a function. Counsel states that the beneficiary will perform and oversee consulting services and will concentrate on evaluating and executing investment opportunities.

Counsel concludes that the beneficiary's performance of these services requires highly specialized knowledge and a senior level of authority. Counsel's assertion is not persuasive. The term "essential function" applies generally when a beneficiary does not supervise or control a petitioner's staff but instead is primarily responsible for managing a function. A petitioner that claims a beneficiary is managing an essential function, 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 evidence that the beneficiary manages an essential function.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The descriptions of the beneficiary's job duties are general, and in addition to borrowing liberally from the definition of managerial and executive capacity, describe an individual primarily providing services to the company. 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 managed 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 or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive 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.