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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

OCT 31 2003

File: WAC 02 151 51403 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, 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 August 1997 in the State of California. It is engaged in the export of paper products. It seeks to employ the beneficiary as its general 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. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel contends that the petitioner provided sufficient evidence to establish that the beneficiary would be employed in an executive and managerial capacity and that a qualifying relationship existed between the petitioner and the beneficiary's foreign employer.

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 petitioner has established a qualifying relationship with the beneficiary's foreign employer.

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

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *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.

On appeal, the petitioner has provided amended tax returns and an explanation of the information displayed on the wire transfer that substantiated the foreign entity's payment for the petitioner's shares. The evidence provided is sufficient to overcome the director's determination on this issue. The director's decision will be withdrawn as it relates to this issue.

The second 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 stated that the beneficiary's responsibilities included:

> [The beneficiary] is responsible for developing and directing policies and general operations, supervising import/export operation, conducting market research, visiting suppliers and purchasers, inspecting products, conduction [sic] quality control, arranging shipment, settling claims, finding, hiring and training qualified employees and coordinating with parent company in Taiwan and affiliate company in China.

The petitioner also provided its California Forms DE-6, Employer's Quarterly Wage Report for the second quarter of 2002, the quarter in which the petition was filed. The California Form DE-6 showed five employees including the beneficiary. The petitioner's organizational chart identified the individuals on the California Form DE-6 as holding the positions of general manager (the beneficiary's position), purchasing manager, accounting manager, documentation and shipping department employee, and messenger. The organizational chart showed the beneficiary supervising the purchasing manager and the accounting manager. In turn the purchasing manager and the accounting manager supervised the documentation and shipping department employee. The messenger's position was shown under the documentation and shipping department. The organizational chart also showed two individuals in the positions of president and purchasing clerk who were not reflected on the California Form DE-6. The petitioner also noted that it used three sales agents located in China but did not provide supporting documentation substantiating their employment.

In response to the director's request for the petitioner's organizational chart listing all employees under the beneficiary's supervision, the petitioner provided a slightly revised organizational chart. The revised organizational chart elevated the documentation and shipping department employee to the position of documentation supervisor on the same tier as the purchasing manager and accounting manager and showed that the messenger position reported to the documentation supervisor.

The director determined that the petitioner's job description for the beneficiary's duties did not establish that the position was either a managerial or executive position. The director also determined that it was reasonable to believe based on the structure of the organization and the number of employees that the beneficiary would be assisting with day-to-day non-supervisory duties. The director further determined that the petitioner had not submitted evidence to establish that the

beneficiary would be a supervisor over subordinate managers or professional employees. The director finally determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary would be a functional manager.

On appeal, counsel asserts that the petitioner's function is to export paper products to China and that the beneficiary not only manages the organization but also its essential business functions. Counsel also contends that the beneficiary supervises other supervisory employees; thus, the beneficiary fulfills the criteria found in the second element of the definition of managerial capacity at section 101(a)(44)(A)(ii).

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 provides a general description of the beneficiary's duties. The petitioner indicates that the beneficiary develops and directs policies and general operations, a statement that essentially paraphrases portions of the definition of executive capacity. *See* section 101(a)(44)(B)(i) and (ii).

However, on appeal, counsel focuses primarily on the beneficiary's claimed "managerial capacity." Consequently, it is unclear whether the petitioner is claiming the beneficiary will 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 remaining portion of the petitioner's description is more indicative of an individual who is primarily performing operational tasks instead of managerial or executive duties. For example, the beneficiary conducts the petitioner's market research, inspects products, arranges shipments, settles claims, and conducts quality control. 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).

Counsel's assertion that the beneficiary manages the essential function of the petitioner's business is also 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. To allow the broad application of the term "essential function" to include all individuals who head organizations would render the term

meaningless. If counsel claims that the beneficiary is managing an essential function, the essential function must be identified with specificity, the essential nature of the function must be articulated, and the proportion of the beneficiary's daily duties attributed to managing the essential function must be established. 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.

Counsel's assertion that the beneficiary supervises other supervisory employees is also not persuasive. The petitioner has not provided sufficient evidence to establish that the primary purpose of the purchasing manager, the accounting manager, and the documentary supervisor is to supervise other individuals. The description of duties for the individuals shown in "supervisory" positions does not include evidence that the majority of their time is spent supervising other employees. 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*, 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).

In sum, the petitioner has not provided sufficient evidence to establish that the beneficiary's primary assignment for the petitioner will be in a 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.