



U.S. Citizenship
and Immigration
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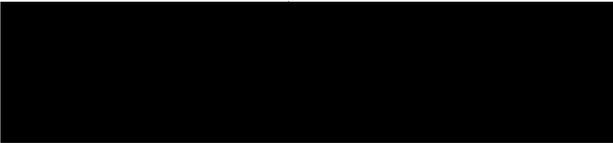


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: AUG 20 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

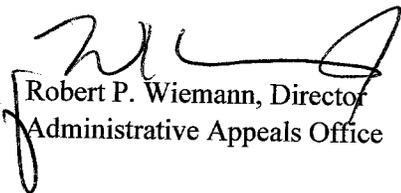
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) the beneficiary was not employed by the foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States as a nonimmigrant; and (2) the proffered position is not in a managerial or executive capacity.

On appeal, counsel submits a brief and additional evidence.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it is a subsidiary of Gratik Tubes Private Limited (Gratik) of India, and imports and distributes granite products. When filing the I-140 petition, the petitioner stated that it employed three persons, one of whom was the beneficiary who was occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of \$30,000 per year.

The first issue to be discussed in this proceeding is whether the beneficiary's job with Gratik was in a managerial or executive capacity. Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(B), the beneficiary must have been

employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately his entry into the United States in a nonimmigrant status.

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.

At the time of filing the petition with the Texas Service Center, the petitioner failed to provide a description of the beneficiary's duties with Gratik. Therefore, on February 18, 2003, the director requested that the

petitioner provide evidence of the foreign entity's staffing level, including the position titles, duties, and educational levels of all employees.

The petitioner responded to the director's request, providing the names, titles and duties of the foreign entity's current employees. The director denied the petition, in part, because the petitioner failed to establish that the beneficiary's employment with the foreign entity was in a managerial or executive capacity. The director acknowledged in the denial letter that the petitioner had submitted information about the foreign entity's employees' duties; however, the director stated that the record did not contain a description of the beneficiary's duties at the foreign entity.

On appeal, counsel states that the beneficiary's employment at the foreign entity was managerial. The petitioner submits evidence that describes the beneficiary's job duties.

The director's denial of the petition, in part, due to the lack of evidence regarding the beneficiary's foreign employment was erroneous, as the director never asked the petitioner to describe the beneficiary's role with the foreign entity. At the time the director sent the petitioner her request for evidence (RFE), the beneficiary had been working for the petitioner in the United States for several years. In the RFE, the director did not ask the petitioner to provide a description of the beneficiary's job with the foreign entity, which would have occurred years earlier. Instead, the director asked the petitioner to "submit evidence of the staffing level at the foreign entity. Give the position titles, duties and educational level of all employees." This request pertained to the foreign entity's current staffing level, and the petitioner provided the requested information. The director cannot then deny the petition, in part, because the petitioner failed to provide evidence for which the director never specifically asked.

On appeal, the petitioner provides evidence of the beneficiary's foreign employment, including a job description. The beneficiary's job description adequately establishes that his employment with the foreign entity was in a managerial capacity for the required period of time. The petitioner has, therefore, overcome the director's objection to the denial of the petition on this one issue.

The second and final issue to be discussed is whether the proffered position of president is in a managerial or executive capacity. The AAO notes that in his brief, counsel asserts that the proffered position is managerial, not executive.

When filing the I-140 petition, the petitioner described the beneficiary's job with the U.S. entity as follows:

[The beneficiary] has the responsibility of establishing and developing the business in the U.S. through sales, and marketing techniques such as advertising, the [I]nternet, and correspondence with new and/or existing clients, preparing reports concerning the Houston office for the parent company in India. As the business is growing, he is spending large amounts of time establishing report [sic] with new clients and establishing company goals and policies. He has successfully managed the day[-]to[-]day operations of the company including hiring, training and recruiting employees and expanding our operations.

The I-140 petition indicated that the petitioner employed three persons; however, the petitioner did not provide any information about the two employees who worked with the beneficiary.

In a February RFE, the director asked the petitioner to "Please submit evidence of the staffing level in the United States. Give the position titles, duties, and educational level of all employees. Please submit W-2 forms for all employees in 2001 and 2002."

In response, the petitioner submitted copies of its W-2 forms for 2002, which showed six employees, but did not submit the W-2 forms for 2001. The petitioner also submitted a letter written by the beneficiary, which outlined his business plan. The petitioner failed to submit the position titles, duties and educational levels of its employees, as requested by the director. In a cover letter with the submission of the materials, counsel stated that the petitioner currently employed three individuals.

In denying the petition because the proffered position is not in a managerial or executive capacity, the director noted that the petitioner failed to provide requested evidence. The director concluded that the beneficiary performs the day-to-day tasks of the company's operations because of the limited number of employees.

On appeal, the petitioner submits the evidence that the director requested in her RFE, which includes the names, duties and educational levels of its employees. The petitioner also submits an organizational chart. In his brief, counsel states that the beneficiary works in a managerial capacity because he manages the organization through managerial staff and an outside accountant, who counsel states is a professional employee. According to counsel, the beneficiary maintains authority over all personnel matters and he has control over the future growth of the company.

Prior to discussing the evidence relating to the denial of the petition on this ground, the AAO must discuss the petitioner's submission of evidence on appeal that the director had requested in her RFE, but that the petitioner failed to submit. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence concerning the position titles, duties, and educational levels of all of its employees, and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.¹

¹ Even if the AAO could consider the job descriptions and organizational chart that the petitioner submits on appeal, this evidence would be of no value. The information about the petitioner's staff pertains to the company's operations in August 2003, not in October 2002 when it filed the I-140 petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). When determining whether a particular position is primarily managerial or executive, the AAO will only consider

As stated previously, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). The only description of the beneficiary's job with the U.S. entity was submitted when the petition was filed. This description states specifically that the beneficiary will assume the job responsibilities associated with sales, marketing, advertising, obtaining a client base, and preparing reports. An individual who performs the tasks that are integral to a company's ability to provide its services does not work in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988).

Although counsel claims that the beneficiary manages other managers, the evidence in the record fails to support his assertions. The beneficiary's job description only indicates that he has authority over "employees"; the petitioner fails to clarify the type of employees that the beneficiary will control. The W-2 forms for 2002 indicate that the petitioner employed only the beneficiary and Hector Rios on a full-time basis. The remaining four employees on the company's payroll appear to be only part-time workers. Mr. Rios's title and job description were not provided for the record, nor were the job titles and duties provided for the part-time employees. Accordingly, there is no evidence that any of these employees actually function in a managerial, supervisory or professional capacity. By providing scant evidence of its organizational structure and staffing levels as of the filing date of the petition, the petitioner cannot meet its burden of proving that the beneficiary will primarily perform the responsibilities specified in the definition of managerial capacity, and will not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Accordingly, the position offered to the beneficiary is not in an executive or managerial capacity, and director's decision to deny the petition on this basis shall not be disturbed.

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.

evidence that pertains to the petitioner's organizational structure as of the filing date of the petition. See 8 C.F.R. § 103.2(b)(12).