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U.S. Citizenship
and Immigration
Services



FILE: WAC 01 294 54423 Office: CALIFORNIA SERVICE CENTER Date: JUL 7 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
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, California Service Center denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Indiana in 1983. It imports and wholesales granite, marble, and natural stone. It seeks to employ the beneficiary as its tile product 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: (1) that the beneficiary had been employed in a managerial or executive capacity for the foreign entity; or, (2) that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the director erred and that the facts and applicable law do not warrant this ruling.

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 that the beneficiary was employed in a managerial or executive capacity for the foreign entity.

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 did not initially provide a description of the beneficiary's job title or duties for the foreign entity. The director requested: (1) the foreign entity's organizational chart describing its managerial hierarchy and staffing levels; (2) the beneficiary's position on the organizational chart and a list of all employees under the beneficiary's supervision by name and job title; (3) a brief description of job duties, educational levels, and annual salaries of all employees under the beneficiary's supervision; and (4) a more detailed description of the beneficiary's duties and the percentage of time the beneficiary spent in each of the listed duties for the foreign entity.

In response, the petitioner indicated that the beneficiary, as the branch manager in India, spent 75 percent of his time on operational duties, including:

- Monitoring production at various factories against our orders
- Inspection & Quality control of Material
- Improvement in packing & Various finishes before shipment
- Introducing new colors
- Negotiating
- Development & Improvement of vanity tops/counter tops/new products
- Communication with Head Office & various vendors of [the petitioner]
- Training new employees on field – Product Knowledge, Inspection & Quality Control
- Introducing, Training New vendors to match the quality standards & other requirements of [the petitioner]
- Visiting abroad for purchasing
- Visiting Head Office to understand the market & customer requirements.

The petitioner indicated that the beneficiary spent 25 percent of his time on administrative duties including:

- Planning: - Purchasing & Scheduling inspections at different factories
- Human Resources: - Hiring, Evaluating & Firing
- Communication: - Regularly with Head Office, Vendors, shipping lines & employees
- Training: - New employees at office in correspondence & documentation
- Inter-action with Co-workers to develop Team Spirits
- Monitoring Shipments to avoid delays
- Pre-scanning all shipping documents before shipment to avoid errors & delays in shipments

The petitioner added that the beneficiary was "in overall charge of all our operations" and was responsible for hiring and firing, all banking, purchases, and coordination with the home office in Anaheim, California. The petitioner also provided the foreign entity's organizational chart during the time the beneficiary was employed as the branch manager. The chart depicted three individuals in the position of "executive," four individuals in the position of "inspector," and one account assistant. The petitioner described the duties of the individuals in the positions of "executive" as:

- Inspection & Quality Control [Granite – Slabs, Tiles or Slates depending on the individual position.]
- Introduction of New Material
- Introducing New Vendors
- Visiting Abroad for Purchasing [in [C]hina, [T]urkey or to understand USA market requirements]
- Training New Employees @ Field & Office
- Reporting to Head Office Every Day
- Coordinating with vendors to ensure the production is as per schedule against our orders
- Training new vendors to meet the standards of [the petitioner]
- Coordinating with shipping lines to ensure shipment is as per schedule
- Negotiating Price & Delivery Schedules
- Executing Project orders

The inspectors performed the same duties except for training new employees, negotiating price and delivery schedules, and executing project orders.

The director observed that the description of duties for the beneficiary, the “executives,” and the inspectors were very similar. The director determined that the description of the beneficiary’s job duties showed that the beneficiary was performing routine day-to-day operational tasks, not managing the foreign branch operations. The director concluded that the petitioner had not established that the beneficiary had been employed outside the United States in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary had the authority to hire and fire employees, and to formulate policies for working hours, holidays, vacations, and sick leave, and that the beneficiary also selected the slate and natural stones, and negotiated and purchased all the merchandise on behalf of the company. Counsel notes that purchasing merchandise [the slate and stone] was the sole mission of the branch. Counsel contends that the beneficiary’s subordinates arranged for the transfer of raw slate and stones from quarries to factories and then to seaports. Counsel also notes that the director had previously approved the beneficiary’s classification in an L-1A, intracompany transferee classification.

Counsel’s assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). As the director observed, the beneficiary and the employees labeled executives and inspectors all inspected and performed quality control functions, introduced new vendors and products, and traveled either for purchasing or to the home office. In addition, the individual in each of these positions was responsible for training new vendors and coordinating shipping schedules. The beneficiary and the employees labeled executives also were responsible for training new employees and negotiating. These are all operational duties, duties that involve performing the foreign entity’s principle function of purchasing merchandise for shipment to the United States office. 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).

Although the beneficiary had additional responsibilities including hiring, firing, evaluating employees and developing team spirit, the petitioner indicated that the beneficiary did not spend a majority of his time performing the duties associated with the foreign entity's human resource function. Further, the beneficiary's responsibilities of monitoring production and shipments, improving packing, developing and improving the product, planning the purchasing, and scheduling inspections are duties of a senior staff specialist or a first-line supervisor, not of an executive or manager.

The petitioner's president's statement on appeal that the beneficiary was also responsible for compliance with export regulations and had discretion to purchase merchandise at whatever price was appropriate does not elevate the beneficiary's duties to those of a manager or executive. The beneficiary clearly operated as a buyer of product on behalf of the petitioner. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Again, although the beneficiary had responsibilities in addition to his buying responsibilities, the petitioner has not substantiated that other duties were the beneficiary's primary focus. To the contrary, the petitioner's president reiterates that the beneficiary's expertise in buying product and working with vendors was a primary contribution to the petitioner's success. The record, at most, establishes that the beneficiary was a senior staff specialist for the foreign entity who also had some duties as a first-line supervisor.

The second issue in this proceeding is whether the beneficiary will be employed in a managerial or executive position for the petitioner.

The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, that the beneficiary would be responsible for managing the import of all granite, natural stone, and marble tile.

The director requested: (1) the United States entity's organizational chart describing its managerial hierarchy and staffing levels; (2) the beneficiary's position on the organizational chart and a list of all employees under the beneficiary's supervision by name and job title; (3) a brief description of job duties, educational levels, and annual salaries of all employees under the beneficiary's supervision; and (4) a more detailed description of the beneficiary's duties in the United States office and the percentage of time the beneficiary spent in each of the listed duties.

In response, the petitioner provided its organizational chart showing the beneficiary as one of four product managers. The beneficiary's position was shown to be the tile product manager. The petitioner indicated the beneficiary spent 70 percent of his time on operational duties involving:

- Inventory level
- Sourcing & Purchasing
- Pricing & Competition
- New Product Information
- Quality Control @ Source & @ Receiving Stage
- Scheduling – Shipping/Receiving

The petitioner indicated that the beneficiary spent 30 percent of his time on administrative duties including:

- Training Employees for product knowledge
- Man power needs – Hiring, Evaluating, Productivity & Firing
- Communication with other teams

The petitioner indicated that the beneficiary's "tile team" consisted of the beneficiary, a purchase planner, a vendor support representative, and a foreman and two helpers in the warehouse. The petitioner also stated that the tile profit center comprised 25 percent of its revenue. The petitioner indicated that the beneficiary "has full and exclusive authority to negotiate and buy tile products from all around the world," and "is responsible for supervising all employees in his team and has full authority to recommend to the Company who to hire and who to fire."

The director determined that the beneficiary's position was a first-line supervisory position over non-managerial and non-professional employees. The director also observed, based on the description of the beneficiary's duties, that the beneficiary would spend a preponderance of his time performing the duties described, not supervising or managing subordinates performing the tasks. The director determined that the record did not show that the beneficiary would be a functional manager. The director concluded that the petitioner had not established that the beneficiary would be performing as a manager or executive, and thus was ineligible for this classification.

On appeal, counsel for the petitioner asserts that the petitioner's sales activities are the operational activities and that the beneficiary's role is to negotiate the petitioner's purchase prices to establish a larger profit margin for the company. Counsel contends that the beneficiary's product planning, product buying, and product merchandising responsibilities elevate the beneficiary's role to that of an executive or manager. Counsel claims that the beneficiary handles the entire series of functions of the tile division and asserts this is not an operational activity.

Counsel's assertions are not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original).

Again, the petitioner's description of the beneficiary's duties shows that the beneficiary spends the majority of his time on operational duties. Counsel's suggestion that only sales duties comprise operational tasks is not meritorious. Although the petitioner is not explicit when listing the beneficiary's operational tasks, the beneficiary is responsible for assessing inventory levels, sourcing and purchasing, pricing and competition as well as providing quality control. Again these duties are indicative of an individual performing the necessary tasks to provide the petitioner's product to its customers. 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*, *supra*.

The petitioner did provide additional detail regarding the duties of the beneficiary's other team members; however, the descriptions for the other team members included primarily clerical duties such as corresponding with vendors, verifying documents, requesting samples and quotations, making appointments, coordinating with vendors and the shipping department, and maintaining inventory and the warehouse. Again, the record suggests that the beneficiary is the senior member of his team; however, the petitioner does not articulate how the beneficiary's assessment of inventory levels, sourcing and purchasing, pricing and competition and providing quality control elevate the beneficiary to the high level responsibilities that are specified in the definitions.

Counsel hints that the beneficiary may be managing the petitioner's tile division function. However, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily 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 is deficient in establishing that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. The record is deficient in establishing that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The petitioner has not provided sufficient documentary evidence that the beneficiary directs the management of the organization rather than performing the essential operational and administrative tasks. The petitioner has not established that the beneficiary's assignment is primarily managerial or executive.

Counsel for the petitioner noted that Citizenship and Immigration Services (CIS) approved nonimmigrant visa petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same evidence contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, *supra*. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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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.