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U.S. Department of Homeland Security  
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Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services



File:



Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Petitioner:

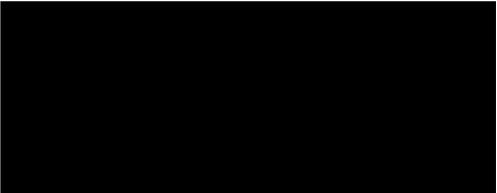
Beneficiary:



MAR 29 2004

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

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prevent clearly unwarranted  
invasion of personal privacy**

**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 California in April 2000. It imports and sells toys and hobby materials. 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 for the United States entity.

On appeal, counsel for the petitioner asserts that the petitioner requires a president and that the director's decision is unsubstantiated by any factual or legal analysis.

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 petitioner has established that the beneficiary will be employed in a managerial or executive capacity.

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 describes the beneficiary's duties as:

In charge of overall management. Plan, develop and establish policies and objectives of the company in accordance with the Board directives. Under the general supervision of the Board of Directors, exercises the wide latitude of the [sic] discretionary decision-making. Direct the implementation of the business expansion plan and operation policies. Direct the utilization of the financial reports and activity data to determine the strategy and progress of the company's business and designate further business goals and plans. Meets with local business leaders to build up the network for the company. Oversees the management strategies and promotion activities, and approve the management improvement. Has the authority to hire, terminate, evaluate, and promote the managerial personnel based on their job performance, qualification and contributions.

The petitioner also provided its California Form DE-6, Employer's Quarterly Wage Report, for the quarter ending September 30, 2002. The California Form DE-6 showed the employment of 10 individuals for the quarter. The petitioner's organizational chart showed the beneficiary as president. The chart also showed four individuals in positions immediately below the president in the positions of business manager, financial manager, marketing analyst, and shipping supervisor. The chart also reflected one employee reporting to each individual in the positions of business manager, financial manager, marketing analyst, and shipping supervisor. The chart showed one additional employee in the position of secretary.

The petitioner indicated that the business manager directed sales policies and promotional strategies, analyzed sales statistics, represented the company at trade association meetings, and supervised marketing executives. The petitioner indicated that the employee reporting to the business manager followed up business leads, negotiated contracts, collected market information, and contacted suppliers and buyers. The petitioner described the financial manager's position as formulating and administering the company's financial policies, supervising the preparation of financial reports, and monitoring cash flow. The petitioner indicated that the employee reporting to the financial manager handled bookkeeping duties. The petitioner described the marketing analyst's position as researching potential products or services, analyzing statistical data, gathering data on competitors, conducting opinion research, and making recommendations to the president. The petitioner indicated that the employee reporting to the marketing analyst assisted the analyst in performing his duties. The shipping supervisor's duties included contacting suppliers, gathering inventory data, arranging the tracking of storage and loading, and routinely inspecting the merchandise. The shipping clerk assisted the shipping supervisor in the performance of the shipping duties.

The director determined that the petitioner's organizational structure did not possess the organizational complexity to warrant an executive position "because they are a ten-employee import and export business" and "all they do is import and export automobile parts." The director determined that the petitioner's description of the beneficiary's duties was vague and paraphrased the definitions of managerial and executive capacity. The director compared the petitioner's organizational chart to the petitioner's California Form DE-6 and determined that the petitioner employed ten individuals. The director then inexplicably concluded that the beneficiary would necessarily be required to perform numerous menial tasks because the petitioner did not employ a sufficient number of employees to perform routine operational tasks. The director concluded that

the beneficiary would be, in essence, a first-line supervisor of non-professional and non-supervisory employees and would not manage or direct a function of the petitioner but would primarily perform the petitioner's operational activities.

On appeal, counsel for the petitioner takes issue with the director's unsupported determinations regarding the beneficiary's performance of menial tasks. Counsel asserts that the director erred when not considering the petitioner's descriptions of the beneficiary's subordinate employees' job duties. Counsel also claims that the positions immediately subordinate to the beneficiary are professional positions that require individuals with bachelor degrees. Finally, counsel contends that the director failed to provide examples of the beneficiary performing operational activities, and the petitioner had provided a contrary description showing that the beneficiary oversees a company consisting of several departments and is responsible for managing the organization.

Counsel correctly points out that the director based his decision, in part, on an improper standard. The director's undefined and unsupported view that the beneficiary would necessarily assist in day-to-day non-qualifying duties because the petitioner is an import/export company that employed 10 individuals is untenable. The director did not articulate a rational basis for finding the petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The director does not substantiate his conclusion that the beneficiary would necessarily be engaged in performing non-qualifying with facts from the record. The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act.

Despite the director's lack of an articulate and reasonable basis for his conclusion that the beneficiary's assignment would not be in a primarily managerial or executive capacity, the AAO cannot properly conclude that the totality of the record supports a managerial or executive classification for the beneficiary. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) 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 petitioner provided a general description of the beneficiary's duties indicating that he was "in charge of overall management," and would "plan, develop and establish policies and objectives," and "exercises the wide latitude of the [sic] discretionary decision-making." These statements are not comprehensive and borrow liberally from the statutory definition of executive capacity. *See* 101(a)(44)(B)(i), (ii), and (iii). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

It is not possible to discern from the remainder of the description of the beneficiary's duties whether the beneficiary would be primarily engaged in providing managerial or executive duties, would be primarily a first-line supervisor of non-professional, non-managerial, and non-supervisory personnel, or would be primarily contributing to the performance of the petitioner's operational tasks. The actual duties themselves reveal the true nature of the employment. *Id.* The burden is on the petitioner to establish eligibility. The lack of a detailed description fails to substantiate that the beneficiary's primary tasks involve executive or managerial duties.

The record does not support counsel's claim that the positions immediately subordinate to the beneficiary are professional positions that require individuals with bachelor degrees. Counsel quotes portions of the *Occupational Outlook Handbook* to substantiate the petitioner's positions of financial manager, business manager, accountant, marketing analyst, and sales specialist are professional positions. However, the petitioner's descriptions of the duties for these positions do not sufficiently correspond to the definitions provided in the *Occupational Outlook Handbook* to draw this conclusion. For example, the petitioner's description of the accountant's duties shows that this position is at most a bookkeeper if not a clerk. Moreover, the petitioner does not provide evidence that these employees hold bachelor degrees or equivalent. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel correctly observes that the director did not consider the petitioner's descriptions of the beneficiary's subordinate employees job duties. However when the beneficiary's duties are not clearly defined, it is not possible to conclude solely from the description of the beneficiary's subordinates' duties that the beneficiary will perform primarily managerial or executive duties. The most that can be concluded is that it is possible that the beneficiary would be relieved from performing non-qualifying duties, but without a definitive description of the beneficiary's duties the AAO will not assume that the beneficiary's duties are primarily managerial or executive.

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.