



U.S. Citizenship
and Immigration
Services

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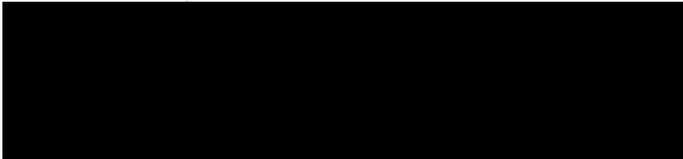
FILE: WAC 01 258 55508 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2004

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 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 Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted; however, the AAO will affirm its prior decision.

The petitioner is a California corporation that seeks to employ the beneficiary as its president and general manager. 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 the proffered position in the United States is not in an executive or managerial capacity. The AAO affirmed the director's findings, stating that the beneficiary's duties were not primarily executive or managerial, and that the petitioner failed to submit job descriptions for its employees.

On motion, 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: (1) is a subsidiary of Guangdong Provincial Tourism Group Corporation of the People's Republic of China (China); (2) is a travel and tourism wholesale corporation; and (3) employs five administrative managers, including the beneficiary, who is currently occupying the proffered position as an L-1A nonimmigrant worker. The petitioner is offering to employ the beneficiary permanently at a salary of \$26,000 per year.

The issue to be discussed in this proceeding is whether the beneficiary's proposed employment with the U.S. entity is in a managerial or executive capacity. The AAO will not repeat its findings in this decision, as they are already part of the record. The AAO will address only the evidence submitted on motion.

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.

On motion, counsel submits a list of the beneficiary's job duties and the job duties of the petitioner's other employees. While the AAO will consider the petitioner's more detailed description of the beneficiary's daily

tasks, it will not consider the duties of the other employees. As stated in the prior appellate decision, the director requested an organizational chart of the petitioner's employees, to include job descriptions for each individual. The petitioner submitted an organizational chart; however, it failed to describe the job duties of its employees. Now the petitioner submits job descriptions for all of its employees on motion. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on motion. Consequently, this decision shall address only the more detailed job description for the beneficiary.

On motion, the petitioner and counsel provide numerous job duties for the beneficiary. These duties range from "directs and manages the operations of the petitioning company and makes all final decisions" to "creates and directs the company's marketing plan . . ." Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner lists some duties that could be considered managerial or executive and others that are clearly not the tasks that a manager or executive would execute. The petitioner fails to quantify the time the beneficiary spends on each task. This failure of documentation is important because several of the beneficiary's daily tasks, such as "handles and resolves problems with more than 400 U.S. travel agencies," and "negotiates with U.S. suppliers of travel and tourism services," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Based upon the evidence in the record, the AAO cannot conclude that the proffered position is in an executive or managerial capacity. The director's decision to deny the petition 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 previous decision of the AAO, dated May 7, 2003, is affirmed. The petition is denied.