



U.S. Citizenship
and Immigration
Services

B4



FILE: SRC 02 189 52405 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

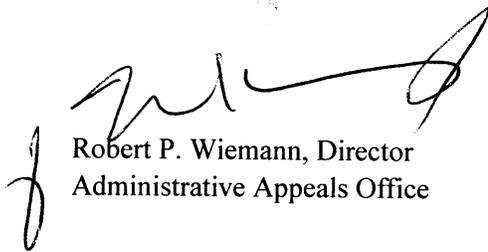
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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

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DISCUSSION: The Director, Texas Service Center, denied the employment-based petition on September 30, 2003. 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 Florida in April 2000. It provides painting, roofing, and improvement services. It seeks to employ the beneficiary as its operations 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 issued a decision that states:

The petitioner has not established that the beneficiary functioned primarily within the “managerial” and/or “executive” capacities in his foreign job assignment. A first[-]line supervisor does not act within the “managerial” capacity as defined unless those supervised are themselves managerial or professional. Title 8 Code of Federal Regulations, Part 204.5(j)(2). The evidence indicates that the beneficiary primarily functioned as a first[-]line supervisor of non[-]managerial, non[-]professional personnel. While the beneficiary managed some functions of the organization, such managerial duties must have comprised the bulk or primary part of his/her job assignment. Here, the major part of the beneficiary’s assignment was as a first[-]line supervisor as noted. Job titles such as “manager” do not compel [Citizenship and Immigration Services (CIS)] to find that a beneficiary functioned primarily in a qualifying capacity unless the major part of the beneficiary’s job assignment actually entailed the duties of an “executive” or “manager” as defined.

On appeal, counsel asserts that the beneficiary is a major shareholder of the foreign entity and that it seems unlikely that the foreign position of a major shareholder would be less than managerial. Counsel also refers to the previous approval of the beneficiary’s classification as a nonimmigrant intracompany transferee as evidence that the beneficiary is eligible for this classification.

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 director addressed only the issue of the beneficiary's foreign job assignment and whether the foreign job assignment had been in a primarily executive or managerial 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 initially provided a list of the foreign entity’s current employees. On July 3, 2003 the director requested that: (1) the petitioner describe how the beneficiary’s work for the foreign entity comprised goal-setting, policy-making, executive-level decision-making and managerial/executive oversight of the foreign organization; (2) the petitioner describe, in detail, all the beneficiary’s duties or functions for the foreign firm; and, (3) if he functioned as a first-line supervisor, whether his immediate subordinates were managers, supervisors or degreed professionals.

In a response dated September 17, 2003, the petitioner implicitly indicates that the beneficiary had been the foreign entity’s general manager prior to entering the United States as a nonimmigrant. The petitioner states that a new general manager assumed the beneficiary’s position when he left. The petitioner also provides the foreign entity’s organizational chart. The organizational chart shows the beneficiary’s successor over a subordinate manager, who in turn, was over eight positions and a warehouse department. The petitioner described the general manager’s position as:

[The general manager] supervises the organization, planning, executing, and controlling of all projects and activities within the company. [The general manager] works with the Manager on setting up job budgets, bidding and construction schedules, site development, and selecting building systems to determine what material or procedure is least costly giving always optimum [sic] quality to the customer. Also, [the general manager] is responsible for financial operations and analysis of each contract and the project cash flow.

The petitioner also submitted job descriptions for the general manager’s subordinate employees.

The director determined that “the petitioner has not established that the beneficiary functioned primarily within the ‘managerial’ and/or ‘executive’ capacities in his foreign job assignment.” The director then referenced the beneficiary’s first-line supervisory responsibilities, determining that the beneficiary was not a first-line supervisor of professional or managerial employees.

On appeal, counsel for the petitioner addresses this issue only by offering an assertion that since the beneficiary is a major shareholder of the foreign entity, it seems unlikely that his position in the company would be less than managerial and by referring to a previous approval of the beneficiary's classification as a nonimmigrant intracompany transferee.

Counsel's assertion is not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not offered documentary evidence that the beneficiary is a major shareholder of the foreign entity. 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). Further, there is no correlation between a shareholder's obligations and those of an individual holding a position within a company.

Moreover, the petitioner's description of the foreign entity's general manager's position is not comprehensive. 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). The petitioner does not document what proportion of time the general manager spent on executive or managerial duties and what proportion of time the general manager spent on non-executive and non-managerial duties. This failure of documentation is important because several of the general manager's tasks, such as setting up job budgets, bidding and construction schedules, site development, selecting building systems, and responsibility for financial operations and analysis of each contract and the project cash flow, do not fall directly under traditional executive or managerial duties as defined in the statute. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO observes that the director did not adequately address this issue and did not articulate the basis for determining that the beneficiary's foreign assignment was in a first-line supervisory role. However, the record remains deficient in establishing that the beneficiary's foreign position was primarily in a managerial or executive capacity for the reasons stated above.

Beyond the decision of the director, the petitioner has not established that the beneficiary's position with the petitioner is in a primarily managerial or executive capacity. The petitioner initially provided a vague and nonspecific description of the beneficiary's duties. For example, the petitioner states that the beneficiary "is responsible for the operation, planning, and administration of any and all operational duties and activities," and for "coordinate[ing] the operational aspects of the business to ensure an efficient and profitable company." The petitioner however, does not define the daily operational duties, activities, or operational aspects of the company. 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).

In addition, although the petitioner provided more detail of the beneficiary's duties in response to the director's request for evidence, the petitioner did not support the detail with documentary evidence. For

example, the petitioner indicates that the beneficiary monitors and assists a project manager; however, the petitioner provides documentary evidence of the employment of only two individuals when the petition was filed. The petitioner's Florida Form UCT-6, Employer's Quarterly Report shows that the petitioner employed only the beneficiary and the general manager/project manager. Although the petitioner claims that it employs 10 individuals on the I-140 petition, the record does not contain evidence substantiating this claim. Moreover, the petitioner's list of individuals holding advanced degrees and the description of their job duties do not comport with the petitioner's invoices for services provided for the previous year. The petitioner appears to have provided primarily painting services for the year prior to and including the filing date of the petition. As such, the petitioner's claimed use of a designer, structural engineer, consulting manager, and project supervisor is incongruous to the petitioner's actual conduct of business. 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). The petitioner has not established that the beneficiary's assignment for the petitioner is primarily managerial or executive.

The AAO further observes an inconsistency in the petitioner's statements regarding its ownership and control. The petitioner's 2000 IRS Form 1120 shows that the foreign entity owns only a 49 percent interest in the petitioner. This information contradicts the stock certificates allegedly issued in 2000 that show the foreign entity owning a 50 percent interest in the petitioner. The AAO has long followed the principle established in *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) wherein the BIA held that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and that any attempt to explain or reconcile such inconsistencies would not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See e.g. Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For these additional reasons the petition will not be approved.

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.