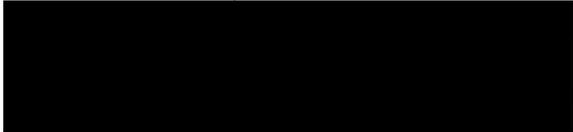


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FEB 15 2005

FILE: WAC 03 059 52742 Office: CALIFORNIA 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

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation claiming to be engaged in production and sales of wire harness and other components for appliances. 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 denied the petition concluding that the petitioner failed to establish that it had been doing business for one year prior to filing the petition and further stated that the beneficiary would not be employed in a managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and submits a brief in support of his arguments.

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 which 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.

The first issue in this proceeding is whether the petitioner had been doing business in the United States for one year prior to filing the instant petition. *See* 8 C.F.R. § 204.5(j)(3)(D).

The regulation at 8 C.F.R. § 204.5(j)(2) states that "doing business" means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

In the November 22, 2002 letter submitted in support of the petition the petitioner stated that its primary business is focused on import, sales, and distribution. Namely, the petitioner claims that it imports products manufactured by its Mexican subsidiary for the purpose of selling such products to manufacturers in the United States. The petitioner also submitted its year 2000 tax return and its financial statement for the year ended November 30, 2001. However, the petitioner submitted no sales invoices documenting the sale of the merchandise it claims to have imported.

Although the record contains the petitioner's tax information, which indicates that the petitioner has an income sufficient to pay its employees, there is no evidence to suggest that the petitioner has, in fact, engaged in the regular, systematic, and continuous sales of its products. The petitioner has submitted no invoices or shipping documents to suggest that merchandise had been imported and subsequently sold in the United States for one year prior to December 12, 2002 when the instant petition was filed. All of the petitioner's invoices submitted on appeal account for sales transactions that occurred primarily in November 2003 and, therefore, fail to address the relevant time period. Although the petitioner submitted tax documentation and its financial statements for the relevant time period, none of these documents affirmatively determine that the petitioner obtained its income by importing and selling merchandise. The submitted documents merely determine that the petitioner had generated income. There is no evidence to indicate that the petitioner's income stemmed from sales transactions as claimed. 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). It is noted that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A review of the record indicates that the petitioner has failed to submit sufficient evidence to establish that the petitioner had been engaged in sales transactions in a regular, continuous, and systematic manner. For this initial reason the petition cannot be approved.

The other issue in this proceeding is whether the beneficiary would be employed in a capacity that is managerial or executive.

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.

In support of the petition, the petitioner submitted the following description of the duties:

As [q]uality [c]ontrol [m]anager, the [b]eneficiary participates in the implementation and administration of the [p]etitioner's operational policies with regard to its twin-plant facility and the development and/or modification of the [p]etitioner's long-range goals and objectives with an emphasis on quality control. The [b]eneficiary oversees the implementation of those goals and is responsible for the function of communicating with our United States customers, ensuring production scheduling, staffing, equipment, quality assurance, and raw materials inventory control. The [b]eneficiary is responsible for ensuring the [p]etitioner's quality control standards and analysis of production, sales and quality control data, making modifications to production layouts or reorganization of production processes as necessary, and monitoring its company's cost-effectiveness and budgeting. He is responsible for technical communications with customers to implement the [p]etitioner's policies, goals and spending priorities in accordance with customer specifications and expectations and that production occurs efficiently, on time, at the required quality level, and within budgetary guidelines.

* * *

The [b]eneficiary continues to be responsible for managing and coordinating [the foreign entity's] quality control operations related to the production of our component parts through directing the work of a team of 50 employees in his department including 2 assistant managers, 2 maintenance managers, 2 quality control supervisors, 1 quality assurance

supervisor, and a staff of up to 44 professional engineers, technicians and operators responsible for the operation and maintenance and overall quality assurance and control. . . .

* * *

The [b]eneficiary continues to oversee the critical implementation of quality control and production standards for machinery and develops budget and cost controls for operating methods, policies and procedures. He has been responsible for obtaining optimum efficiency in production methods and utilization of machinery and equipment and analyzes quality control data to make changes in training programs, production procedures and other areas as required. He exercises discretionary authority in decisions pertaining to personnel matters as well as in the purchase of major equipment and machinery.

In a notice, dated April 30, 2003, the director requested that the petitioner submit additional information. The request included instructions to provide the petitioner's organizational chart describing its managerial hierarchy and staffing levels. The petitioner was instructed to clearly identify the beneficiary's position in the chart, identify his subordinates by name and job title, and to list their job duties and educational levels. The petitioner was also asked to provide a more detailed description of the beneficiary's duties in the United States with an indication of the percentage of time spent performing each of the listed duties. Additional documentation was also requested in the form of the petitioner's wage reports, W-3 and 1099-Misc. statements, as well as employee W-2 statements for 2002.

In response, counsel submitted a letter dated July 18, 2003 listing all of the supporting documents submitted. The petitioner also submitted a letter dated July 14, 2003 with the following description of the beneficiary's duties in the United States:

[W]e require an individual with the quality control expertise to assess the relevant issues and to formulate the necessary procedures and specifications to ensure our customers' production needs are met. In addition, the [q]uality [c]ontrol [m]anager will provide sales support to our sales staff and executives by identifying the various quality control certifications our company possesses as well as describing and explaining the internal controls and policies we have in place at our subsidiary manufacturing facility. Due to the specialized knowledge requirements of this position, it was necessary to transfer [the beneficiary]. . . . [His] day-to-day responsibilities for overseeing our quality control, product engineering, and maintenance activities at our subsidiary have been given to managers and supervisors working at our manufacturing facility. . . .

* * *

As [q]uality [c]ontrol [m]anager, [the beneficiary] continues to be responsible for providing general oversight over our quality control functions at our subsidiary [The beneficiary] is responsible for directing the activities of our floor managers and first-line supervisors at our subsidiary to implement our quality control procedures and policies. [He] develops such policies and procedures to ensure the delivery of products that meet our customers' expectations while maintaining a profit margin consistent with the business goals of our parent company in Japan. He analyzes quality control data regarding defects, waste, and

damaged goods to identify areas requiring remedial action. [The beneficiary] is also responsible for ensuring our compliance with the quality standards certifications that have been granted to us by overseeing the internal audit process as well as to resolve any concerns of independent assessment teams. He communicates regularly with the [p]resident as well as executives in Japan in developing strategies to utilize the latest quality control techniques. [The beneficiary] has the ultimate approval authority regarding personnel actions in his department. Finally, . . . [he] meets with our customers to evaluate their new products to formulate product specifications to ensure product quality. He will also resolve any production issues our customers may have by reformulating specifications to meet their needs. [The beneficiary] also provides sales support by promoting our business and goodwill by emphasizing and explaining the quality certifications our company possesses as well as the internal audit procedures and policies we have in place at our subsidiary. [He] will spend approximately 60% of his time overseeing our quality control functions and the remaining 40% of his time will be spent meeting and liaising with our customers.

The petitioner also complied with the petitioner's requests for an organizational chart, employee list, and quarterly wage statements. It is noted that the petitioner's fourth quarterly wage report, which reflects the petitioner's employees at the time the petition was filed, lists a total of seven employees including the beneficiary. However, only one of those employees is listed among the beneficiary's subordinates. According to the petitioner, the rest of the named subordinates work at the petitioner's subsidiary, which is located in Mexico.

The director denied the petition concluding that despite the beneficiary's description of duties, the evidence of record does not support the claim that the beneficiary would be employed as a multinational manager or executive. The director also noted that the beneficiary's team of subordinates is employed by the petitioner's Mexican subsidiary, not by the petitioner. The director further commented on the petitioner's organizational chart, which indicates that most of the petitioner's employees have managerial or executive titles.

On appeal, counsel asserts that the petitioner's primary concern is to manage the foreign subsidiary and claims that the beneficiary helps accomplish this task by managing the foreign entity's quality control and maintenance activities, which he does by setting goals and establishing policies. While counsel suggests that the beneficiary has subordinate employees, neither he nor the petitioner explain with sufficient detail how the beneficiary is able to manage individuals that are physically located at a work site outside of the United States and is hundreds of miles away from where the beneficiary himself is working. It is noted that 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). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further states that the beneficiary supervises a staff of managers and supervisors and that this by definition implies that the beneficiary cannot be a first-line supervisor. However, the evidence of record, mainly the petitioner's organizational chart, does not corroborate counsel's claim. The organizational chart submitted in response to the request for evidence shows a number of professional and managerial positions. However, of the total seven individuals employed by the petitioner when the petition was filed, the

organizational chart shows only one of those individuals in a position subordinate to the beneficiary. The remaining five individuals, who are named in the petitioner's fourth quarterly wage statement for 2002, appear above the beneficiary in the petitioner's organizational structure. The remaining employees that appear on the organizational chart as the beneficiary's subordinates are all employed at the foreign subsidiary.

In 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). In the instant case, the various descriptions of the beneficiary's job duties is too general to convey an understanding of exactly what the beneficiary will be doing on a daily basis, particularly in light of the fact that 60% of the beneficiary's time would be spent managing quality control, a function that is purportedly carried out by employees at the petitioner's foreign subsidiary. The petitioner provides no information to explain how the beneficiary would spend a majority of his time managing employees that actually work in another country and are not within the beneficiary's immediate supervision. 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). As the petitioner failed to specify the actual duties the beneficiary would perform in carrying out the quality control function, the AAO is left to question what the beneficiary would be doing on a day-to-day basis. Furthermore, the petitioner stated that the beneficiary would spend 40% of his time meeting with customers in an effort to understand, and ultimately meet their specific needs with regards to the petitioner's products. This indicates that 40% of the beneficiary's time would be consumed with actually performing the daily sales and customer service related duties, which cannot be deemed managerial or executive. It is noted that 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 AAO cannot affirmatively conclude that the beneficiary primarily performs operational tasks, the fact that a significant portion of the beneficiary's time is consumed with non-qualifying tasks while the remaining 60% of his time is consumed with duties that the petitioner failed to define with any specificity precludes the AAO from concluding, with any degree of certainty, that the beneficiary primarily performs managerial or executive duties. For this additional reason this petition cannot 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.