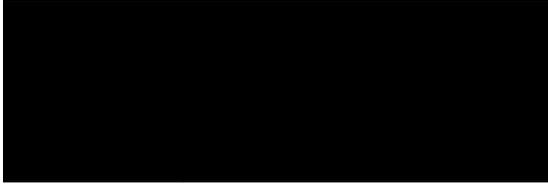


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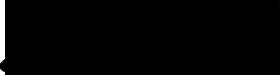


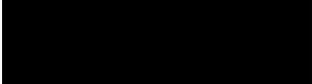
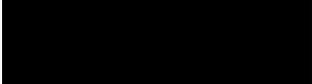
U.S. Citizenship
and Immigration
Services

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FILE:  Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2005

IN RE: Petitioner: 
Beneficiary: 

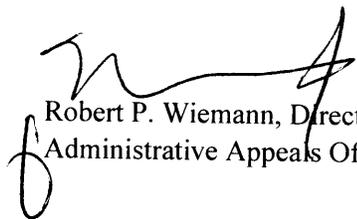
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, California Service Center, denied the employment-based 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 March 1999. It provides localization and internationalization engineering, consulting, and management service. 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 primarily managerial or executive capacity for the United States petitioner.

On appeal, the petitioner provides additional documentation to show that the beneficiary is employed as an executive.

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 beneficiary will be employed in a managerial or executive capacity for the United States 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.

In a February 25, 2003 letter appended to the petition, the petitioner stated that the beneficiary's duties were to:

[D]evelop business and liaise between U.S. subsidiary and parent company; plan, develop and establish policies of subsidiary in accordance with board directives and corporation charter; confer with company officials to plan business objectives; develop organizational policies to coordinate functions and operations between parent company and U.S. subsidiary.

On June 1, 2004, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: an organizational chart describing its managerial hierarchy and staffing levels as of the date of filing the petition and including the names of all executives, managers, supervisors and employees within each department or subdivision; a list of all employees under the beneficiary's supervision by name and job title; a brief description of job duties and educational level for all employees under the beneficiary's supervision; and California Forms DE-6, Employer's Quarterly Wage Report, for 2003 and the first quarter of 2004.

On August 16, 2004, the petitioner provided its response including an organizational chart for the time period beginning April 1, 2003 through September 30, 2003. The chart listed the beneficiary as president, a software manager, a localization engineer, and a vacant sales manager position. The petitioner noted that: the software manager evaluated customer's software programs and converted the software into other languages; the localization engineer performed linguistic translation, proofreading, editing, and re-writing tasks for the software; and, the sales manager contacted potential customers to sell software localization services, performed quality assurance, and resolved customer's complaints. The petitioner's California Forms DE-6, for the quarter in which the petition was filed, confirmed the employment of the beneficiary and individuals in the position of software manager and localization engineer.

The director observed that the petitioner's job description of the beneficiary's duties re-stated elements listed in the definition of executive and managerial capacity. The director determined that without more specific information, the record did not establish that the beneficiary performed primarily in a managerial or executive capacity. The director also determined that the petitioner's organizational structure required the beneficiary to provide primarily operational and administrative services. The director concluded that upon review of the totality of the record, the petitioner had not provided sufficient evidence to demonstrate that the beneficiary would be relieved from performing primarily non-qualifying duties.

On appeal, the petitioner asserts that the beneficiary is an executive. The petitioner provides examples of decisions and electronic mail produced by the beneficiary on behalf of the parent company and the petitioner. The petitioner indicates that the beneficiary meets with business partners, communicates with the petitioner's sales managers, meets with customers, and attends networking conferences. The petitioner notes that it has tried to recruit employees and meanwhile uses independent contractors to perform the petitioner's work.

The petitioner's assertion and documentation is not persuasive. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). When the petition

was filed, the petitioner employed the beneficiary and two subordinate employees.¹ At that time, the beneficiary was required to perform the operational task of selling the petitioner's services. The documentation provided by the petitioner on appeal, shows that many of the decisions made by the beneficiary concerned the sale of the petitioner's services to other organizations. 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).

Moreover, the petitioner's general description of the beneficiary's duties suggests that the beneficiary's principal duty is to develop the petitioner's business. 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). The petitioner is in the business of marketing and supporting its Hong Kong parent company's software localization and internationalization business. Developing the petitioner's business necessarily would include the sale of its services. The petitioner has not provided evidence that it employed sufficient salespersons to relieve the beneficiary from providing this non-qualifying task.

Finally, 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). The petitioner has not provided evidence to demonstrate that the petitioner's organizational structure was sufficiently complex when the petition was filed to relieve the beneficiary from performing the petitioner's day-to-day operational tasks.

On appeal, the petitioner asserts that the director failed to consider the petitioner's recruiting efforts and use of independent contractors. However, as observed above, the petitioner must establish eligibility when the petition was filed. The petitioner's addition of employees or the use of independent contractors subsequent to filing the petition is not pertinent to establishing eligibility when the petition was filed.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner comprise primarily executive or managerial duties.

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.

¹ Although the petitioner does not appear to claim that the beneficiary's position is managerial, even if such a claim had been made, the AAO notes that the record does not establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Likewise, the record does not demonstrate that the beneficiary manages an essential function, rather than providing the petitioner's necessary operational services.