



U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



134

FILE: [REDACTED]
WAC 03 096 54138

Office: CALIFORNIA SERVICE CENTER

Date: JUN 07 2005

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 that is engaged in the development, sales, maintenance and repair of RealVision graphics and video electrical board products. The petitioner is seeking to employ the beneficiary in the United States as its executive vice president, director of engineering. 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 beneficiary would not be employed in a managerial or executive capacity and denied the petition. The director also noted discrepancies regarding the beneficiary's salary and stated that Citizenship and Immigration Services (CIS) is unable to determine whether the petitioner has the ability to pay the beneficiary's proffered wage.

On appeal, counsel disputes the director's findings with the submission of a brief.

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 a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 beneficiary would 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.

In a letter dated December 17, 2002, submitted in support of the petition, the petitioner stated that the beneficiary was promoted to the position of vice president. The petitioner stated that the beneficiary's duties in his new position have been and would be within an executive and managerial capacity. The following description of responsibilities was provided:

[The beneficiary] exercises wide latitude in discretionary decision-making in all aspects of the organization[s] management in the U.S. He manages financial matters, interviews and hires the VP of [s]ales, signs for agreements, promotes design service business, and develops new [g]raphics [c]hips. In this position, he establishes and manages all the operations of the company and is also responsible for the sales of [the foreign entity's] products in the

U[.]S[A.] [The beneficiary] receives only general supervision and direction from higher-level executives, the board of directors, and stockholders. He has the authority to hire, fire, and recommend personnel actions, such as promotions and leave authorizations. He reports directly to [the petitioner]'s [p]resident, [sic] from whom he receives only general guidance and supervision in the performance of his duties. He also has led an engineering team to develop our graphics chip GA 400

[The petitioner] has continued to employ [the beneficiary] as an [e]xecutive [v]ice [p]resident, [d]irector of [e]ngineering. In this capacity, he directs the management of the organization in the U.S. [The beneficiary] directs the goals and policies that focus on the distribution of [the foreign entity's] products in the U.S., and on the growth of the organization nationwide, by hiring more professionals to offer reasonable distribution and flexible technical support, [sic] so that he can guide the organization's business plan to success. [The beneficiary] has wide latitude in discretionary decision-making in all aspects of directing the planning, managing and leading of all product and process design activities for [the petitioner]. He has also directed the creation and modifications in the process of manufacturing our products. [His] duties involve the exercise of considerable discretion and direction over the day-to-day operations as mentioned above, including selecting, hiring, and supervising [the petitioner]'s support staff. As an [e]xecutive [v]ice [p]resident, he only receives general supervision and direction from higher-level executives, the board of directors, and stockholders. [The beneficiary] also establishes all relevant company policies regarding the formulation and implementation of short and long-term product and process technical development plans, reviewing new product/market opportunities to effectively utilize such opportunities. [He] reports directly to [the petitioner]'s [p]resident, [sic] from whom he receives only general guidance and supervision in the performance of his duties.

The petitioner also submitted an organizational chart showing the hierarchies of the foreign and U.S. entities. The petitioner's organizational chart names three individuals: the president, the beneficiary in the position of vice president, and a vice president of sales.

On April 22, 2003, the director issued a request for additional evidence (RFE) instructing the petitioner to submit a more detailed description of the beneficiary's proposed job duties. The petitioner was specifically instructed to explain what duties the beneficiary would perform on a daily basis and to assign a percentage of time the beneficiary would spend performing each listed duty. The director also asked that a list of the beneficiary's subordinates be submitted, as well as their job titles and position descriptions.

In regard to the percentage breakdown of duties, the petitioner submitted the following list:

1. Managing the overall company ([the petitioner]): 40%. This includes developing goals and policies about marketing, sales, and employment policies.
2. Managing financial matters: 20%. This includes making executive decisions about payment of assets, expenditure control, and monitoring cash flow (profit and loss).
3. Supervising our VP of [s]ales: 20%.

4. Supervise and direct U.S. efforts for our overseas engineering team: 20%.

The petitioner provided an additional description of responsibilities and categorized them as executive and managerial. As the director included the petitioner's description in its entirety in the denial, the AAO need not repeat that description in this decision. In regard to the beneficiary's subordinates, the petitioner indicated that the beneficiary supervises ten engineers, who are located in Japan, and one vice president of sales. No job descriptions were provided for any of the claimed United States based subordinate(s).

On September 2, 2003, the director denied the petition concluding that the petitioner's description of the beneficiary's duties is deficient and fails to adequately convey what duties the beneficiary would perform on a day-to-day basis. Specifically, the director stated, "The petitioner attempted to tailor an individual's job description around the four requisite elements for the purpose of making a deficient petition comply with Service requirements."

On appeal, counsel vehemently objects to the above comment stating that the director erroneously implies a dishonest intent on the part of the petitioner. While the AAO chooses not to speculate on the issue of the petitioner's intent, the fact of the matter is that, 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). In an effort to elicit this pertinent information, the petitioner was provided with a detailed RFE specifically instructing the petitioner to provide a description of duties that would convey an understanding of what actual duties the beneficiary would perform. 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).

While the petitioner in the instant matter generally focuses on the beneficiary's discretionary authority in formulating the petitioner's company policies and making decisions that affect the organization as a whole, the AAO notes that reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.*

Counsel also objects to the director's reliance on the petitioner's personnel size to draw conclusions as to the beneficiary's duties. Counsel states that the record lacks any documentation to support the director's assumptions. Contrary to counsel's understanding, however, CIS is under no obligation to find documentation that affirmatively supports the director's findings, particularly when those findings are based, in part, on the petitioner's failure to submit evidence in support of its claims. The burden of proof in these proceedings is entirely on the petitioner to establish its eligibility. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Counsel's mere statement that the director has not submitted sufficient evidence to support his finding is not sufficient to meet this burden.

Furthermore, the director's consideration of the size of the petitioning organization comports with current law. While size cannot be the sole consideration in determining eligibility for multinational manager or executive status, the director can and should consider the size of the petitioner's personnel for the purpose of

establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. In the instant matter, the director clearly explained that a small support staff suggests that the petitioner does not have sufficient personnel to relieve the beneficiary from performing nonqualifying duties. According to the petitioner's first quarter 2003 Form DE-6, the petitioner had only two employees, one of whom was the beneficiary himself. Although the petitioner's organizational chart, which was submitted in response to the RFE, shows an additional employee in the position of accounting manager, there is no indication that this position was filled at the time of the filing of the petition. 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). Thus, any changes to the petitioner's organizational structure that occurred after the petition was filed are irrelevant for the purpose of determining the petitioner's eligibility to classify the beneficiary as a multinational manager or executive.

While the petitioner discusses the ten engineers the beneficiary manages, the petitioner readily discloses the fact that these individuals are employed abroad, not in the United States and, therefore, carry out their duties thousands of miles away from the beneficiary's actual place of work. The petitioner has provided no explanation as to the practical means for managing these employees. Thus, the beneficiary is left with a single subordinate employee in the United States to carry out all of the petitioner's operational duties. Based on this organizational structure and the petitioner's failure to provide a comprehensive and detailed list of the beneficiary's proposed job duties, the AAO cannot affirmatively conclude that the beneficiary would perform primarily qualifying duties on a daily basis.

Counsel also challenges the director's conclusion that the beneficiary does not qualify as a multinational manager because he does not oversee the work of managerial or professional employees. Counsel claims that the director failed to inquire into the job duties of the beneficiary's subordinate and relied solely on his job title in making the adverse finding. Counsel's objection, however, is without merit. A thorough review of the director's RFE clearly shows that the director did, in fact, attempt to elicit the pertinent information about the duties of the beneficiary's subordinate(s). When the petitioner failed to provide this information, the director had no choice but to issue findings based on the record of proceeding.

Counsel further states that the director improperly interpreted the law regarding function managers. He asserts that the law does not require the petitioner to demonstrate that the function is not performed by the beneficiary. While counsel is correct in pointing out that the statute and regulations do not contain the explicit language used by the director, precedent case law clearly establishes 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). Furthermore, counsel refers to 8 C.F.R. § 214.2(l)(ii)(B)(3), a section that contains provisions for petitioner's seeking to obtain an L-1 nonimmigrant visa. However, the petitioner has filed a preference visa seeking to classify the beneficiary as an employment-based immigrant. Provisions for the type of benefit sought by the petitioner are found in 8 C.F.R. § 204.5(j).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity. The petitioner has not demonstrated that the beneficiary would be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he would otherwise be relieved from performing nonqualifying duties. The petitioner has not demonstrated that it has reached a level of organizational complexity wherein the hiring/firing of personnel,

discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Nor does the record demonstrate that the beneficiary primarily manages an essential function of the organization. Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant matter, counsel properly points out that the director's decision in regard to the issue of the petitioner's ability to pay is plagued with grammatical errors and language that is difficult to understand. However, both the petitioner and the AAO understand that the director questioned the petitioner's ability to pay the beneficiary's proffered wage.

Counsel asserts that the petitioner has established this burden and explains the discrepancy between the petitioner's DE-6 quarterly wage returns and the petitioner's annual tax return for the same time period. This explanation is further reiterated in a statement from the petitioner's accountant who explains that a portion of the beneficiary's salary, approximately 40%, was provided by the beneficiary's foreign employer. The accountant further states that the beneficiary received a total of \$67,076 from the petitioner and that the remainder of the beneficiary's salary was paid by the foreign entity. While this explanation may adequately account for the noted discrepancy between the petitioner's quarterly wage statements and annual tax returns, it does not establish the petitioner's ability to pay the beneficiary's proffered wage. On the I-140 petition, the petitioner indicated that the beneficiary's salary would be \$100,000 per year. By counsel's own admission, the petitioner has paid only 60% of that amount. Based on the petitioner's 2002 tax return, if the petitioner were to have paid the beneficiary the full amount of his proffered wage, it would have operated with a net loss. Therefore, the petitioner has failed to establish its ability to pay. For this additional reason, the petition cannot be approved.

Beyond the decision of the director, the record lacks evidence to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer or that the petitioner had been doing business for one year prior to filing the instant petition. See 8 C.F.R. § 204.5(j)(3)(C) and (D), respectively.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional grounds discussed in the above paragraph, 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.