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20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE: [Redacted]  
EAC 04 047 52258

Office: VERMONT SERVICE CENTER

Date: JUN 1 2005

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

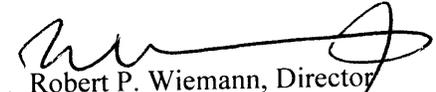
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to  
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

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, Vermont 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 Delaware in August 2002. It imports and distributes cooling and refrigeration systems. It seeks to employ the beneficiary as its vice-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 entity.

On appeal, counsel for the petitioner asserts that the director's decision is in error and submits documentation in support of the petitioner's claim.

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.

On the Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary would be "second in charge of all US operations[,] hiring and firing staff[,] directing marketing[,] setting policy[, and] maintaining contact with home office." The Form I-140 also indicated that the petitioner employed eight individuals. In a November 1, 2003 letter submitted with the petition, the petitioner stated that the beneficiary would serve as its vice-president and listed the beneficiary's duties as:

- Oversees team of managers with various types of responsibilities.
- In-charge of Day-to-Day operations.
- Receives Sales & Marketing report and figures.
- Year-to-Date sales figures, projections, and goals.

On February 11, 2004, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested, among other things: a detailed description of the beneficiary's proposed duties that included a breakdown of the number of hours devoted to each of the beneficiary's weekly job duties; a copy of the petitioner's 2003 Forms W-2, Wage and Tax Statement, and copies of the petitioner's 2003 payroll roster; and, evidence of the use of contractors including the duties the contractors performed, if contractors were used to perform any of the petitioner's functions. The director also noted that the following questions might assist the petitioner in preparing its response:

1. How many subordinate supervisors are under the beneficiary's management?
2. What are the job titles and job duties of the employees managed?
3. What managerial/executive and technical skills are required to perform the duties?
4. How much of the time spent by the beneficiary is allotted to managerial/executive duties and how much to other non-managerial/executive functions?
5. What degree of discretionary authority in day-to-day operations does the beneficiary have in the job?
6. Who will operate the business in the absence of the beneficiary?

On June 21, 2004, counsel for the petitioner submitted the petitioner's documentation in response to the director's request. The petitioner provided its organizational chart showing a chief executive officer, the beneficiary in the position of vice-president, a chief financial officer, a director of sales and a network of 15 contractors, a deputy general manager, and an accounting manager. The petitioner stated that the beneficiary's job duties included:

- 1) Manage all internal staffs [sic].
- 2) Collectively work with all advertisement companies.
- 3) Liason [sic] between Korea factory.
- 4) Monitoring absorption chiller market in North America & South America.
- 5) Oversee managers who control distributors.

The petitioner also provided two documents listing the time the beneficiary spent on various duties. One document indicated that the beneficiary spent an hour each morning checking electronic mail and facsimiles, an hour on Monday morning checking pending matters, an hour on Tuesday morning ordering replies to

related staff, an hour on Thursday "marketing and developing plan," and an hour on Friday morning following up on customer's requests. The petitioner indicated that the beneficiary's afternoons were taken up with following up on overseas customers' requests and approving staff requests, meeting with customers, preparing the next week's business plan, and checking on sales status and on the processing of orders. The petitioner indicated that on each Wednesday the beneficiary was in factory/technical meetings.

In a second document, the petitioner listed the days of the week and allocated the beneficiary's time to weekly meetings with staff, vendors, distributors, customers, the district salesman, the petitioner's president, and the petitioner's accountant. The petitioner also indicated that the beneficiary attended weekly sales meetings and worked with the sales team on developing and enhancing sales, catalogues, drawings, shows, etc., and on miscellaneous work and product development.

The petitioner also provided its 2003 fourth quarter New Jersey Quarterly Taxable Wage Report, the quarter in which the petition was filed. The New Jersey Wage Report indicated that the petitioner had paid a salary to three individuals in the quarter ending December 31, 2003. The names listed on the New Jersey Wage Report corresponded to the individuals identified as the petitioner's president, the beneficiary's position as vice-president, and the sales director.

The director observed that the petitioner's organizational chart showed the employment of six individuals and a network of 15 contractors, the petitioner's Form I-140 petition indicated the employment of eight individuals, the petitioner's 2003 Internal Revenue Service (IRS) Forms W-2 had been issued to only three people, and that the petitioner's tax records regarding salaries paid showed disparate figures. The director determined that the record did not clearly show how many individuals the petitioner employed. The director also determined that the petitioner's description of the beneficiary's duties was vague and failed to describe the beneficiary's actual day-to-day duties. The director noted that the record did not contain position descriptions for the petitioner's employees and determined that the beneficiary likely provided the petitioner's services to its customers. The director concluded that the record did not demonstrate that the beneficiary qualified as a manager or executive other than in position title.

On appeal, counsel for the petitioner submits a September 2, 2004 letter from the petitioner's accountant that explains the negligible discrepancies among the petitioner's various tax records listing salaries paid. Counsel for the petitioner also submits an undated letter from the petitioner's president. The petitioner indicates that the petitioner was established to supply a specific type of equipment to contractors who would persuade "project owners" to consider the contractors' job proposals. The petitioner states that the beneficiary regularly checks the status of projects with contractors through the sales director and that the beneficiary is available to answer the contractors' technical questions, to explain the benefits of the petitioner's specialized equipment, and the technical and commercial background of the specialized equipment, including its research and development. The petitioner notes that the beneficiary is on call 24 hours a day to address any technical or service issues that arise. The petitioner acknowledges that it employs only three individuals full-time and that the chief financial officer and accountant are only employed part-time because the petitioner's sales revenues "are not great" at this time. The petitioner indicates that it is attempting to branch out into another business and that it employs one other individual part-time who is in charge of a painting business.

The petitioner's letter and explanations are not persuasive. 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 clarify whether the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

Moreover, the petitioner's description of the beneficiary's duties is general and not supported by the record. The petitioner indicates that the beneficiary oversees managers and manages internal staff but the record shows only the full-time employment of one salesperson subordinate to the beneficiary when the petition was filed. 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 indicates that the beneficiary is "In-charge of Day-to-Day operations" a description that paraphrases an element of the definition of managerial capacity. See section 101(a)(44)(A)(iv). Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The petitioner's description of the beneficiary's weekly duties indicates that the beneficiary spends the majority of his time on electronic mail and facsimiles and in meetings but the descriptions do not expound upon the beneficiary's actual purpose. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. On appeal, the petitioner finally hints at the beneficiary's actual role in the petitioner's business, indicating that the beneficiary is the individual who has the technical expertise to answer questions and resolve issues during the sale and service of the petitioner's specialized equipment. The AAO also observes that the beneficiary routinely signs the purchase orders on behalf of the petitioner. These are operational tasks and are not traditionally managerial or executive duties. 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).

The petitioner has provided a general description of the beneficiary's duties that suggests, at most, that the beneficiary provides technical expertise in the sale and service of the petitioner's product. The record does not substantiate that the beneficiary's duties comprise duties that are primarily managerial or executive. 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).

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner include primarily executive or managerial duties. The petitioner has not submitted evidence on appeal to overcome the director's decision.

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.