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FILE: [Redacted]
EAC 03 165 51324

Office: VERMONT SERVICE CENTER

Date: JUN 13 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 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 1997. It develops software. It seeks to employ the beneficiary as a project 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 determined that the petitioner had not established that the beneficiary had been employed for the foreign entity in a primarily managerial or executive capacity prior to entering the United States as a nonimmigrant.

On appeal, counsel for the petitioner asserts that the director misapplied the law when making her decision.

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 was employed in a primarily managerial capacity for one year prior to entering the United States as a nonimmigrant. The petitioner does not claim that the beneficiary was employed in an executive capacity for the foreign entity prior to entering the United States.

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.

In an April 25, 2003 letter appended to the petition, the petitioner indicated that the beneficiary began his work for the foreign entity sometime in April 2000. The petitioner stated that the beneficiary worked on several engineering projects as project leader in April and May 2000, as integration technical leader in May through September 2000, and was promoted to technical leader off-shore in October 2000 where he remained until March 2001 when he was transferred to the United States to work as a system analyst.

The petitioner described the beneficiary's initial duties with the foreign entity as "development leader" in charge of a team of two systems analysts and, indirectly, a database developer/administrator. The petitioner stated the beneficiary was in charge of the design and integration of a database, supervised staff, established employee goals, conducted employee performance reviews, presented a professional image of the company, and established and maintained relationships with contractors and equipment suppliers.

Subsequently, the beneficiary was assigned to a different project as integration technical leader. In this position the beneficiary was jointly in charge of six system analysts for "broad vision implementation" and web development and was solely responsible for a training support specialist. In addition, the beneficiary

designed and implemented "Work Shops 1 to 1," analyzed business client requirements, and directed the team to generate technical specifications.

In October 2000, the beneficiary was promoted to "technical leader off-shore." The petitioner indicated the beneficiary's duties as technical leader included supervision of three system analysts' work, liaison with clients to develop information systems on web technology, and coordination of efforts between the software factory and clients. The petitioner also indicated that in this position, the beneficiary had complete discretionary authority to set goals and make all necessary business decisions to achieve the project's goals.

On August 8, 2003, the director observed that the foreign positions held by the beneficiary may have involved some management of projects or acting as the lead for a particular project, but that it was not apparent that the position held was a managerial position. The director requested the petitioner's response to which of the beneficiary's duties it considered managerial and the percentage of time the beneficiary spent on the managerial duties.

In an October 31, 2003 response, the petitioner outlined the beneficiary's duties and identified all the duties as managerial. The petitioner also provided the percentage of time the beneficiary spent on the duties for each of the three projects the beneficiary had been involved in. The petitioner concluded that the beneficiary's position for the foreign entity had been managerial because: (1) he supervised the work of professionals; (2) his duties included the unfettered discretionary authority and direction over the day-to-day operations of the activity in each of the near shore projects that he managed and for which he had authority; and, (3) his duties included the management of the three projects which are vital components of the foreign entity's software factory organization.

On May 24, 2004, the director denied the petition. The director observed that being in charge of three to six professional employees and having discretionary authority and direction over the day-to-day operations of an activity involved some management skills, but that the overall duties within the scope of the beneficiary's project related tasks appeared to be supervisory. The director noted that employers commonly attempted to classify every task or component of an undertaking as managerial but such classifications were not realistic. The director concluded that the beneficiary was a first-line supervisor but that first-line supervisors were not considered managerial employees.

On appeal, counsel for the petitioner contends that the beneficiary functions as a manager because: (1) he managed the day-to-day activities of the projects assigned to him; (2) he had full discretionary authority over the work of the professional employees he directed, such as establishing schedules, assigning tasks, and coordinating activities of all teams; and, (3) he negotiated contract terms with the clients to accomplish the goals of each project. Counsel also advised that the beneficiary was not a supervisor but if he had been a supervisor, he would qualify as a manager because he supervised the work of professionals. Counsel attached the curriculum vitae of several of the individuals whose work had been under the supervision of the beneficiary. Counsel indicated that the beneficiary's curriculum vitae had also been attached but it is not in the record before the AAO.

Counsel's contentions are not persuasive. First, the petitioner has not provided evidence of the exact dates of the beneficiary's employment with the foreign entity in the claimed managerial capacity. The petitioner notes the beneficiary was hired sometime in April 2000 as a "development leader" in charge of a team of two systems analysts and indirectly a database developer/administrator. The beneficiary worked for the foreign entity until sometime in March 2001 when he was transferred to the United States in H-1B status to work for the petitioner. Thus, the record does not substantiate that the beneficiary worked for the foreign entity in a managerial capacity for one full year in the three years prior to entering the United States as a nonimmigrant.

Moreover, the description of the beneficiary's duties for the first month of his employment with the foreign entity does not describe an individual performing primarily managerial duties. The petitioner indicates that the beneficiary was in charge of the design and integration of a database, supervised staff, established employee goals, conducted employee performance reviews, presented a professional image of the company, and established and maintained relationships with contractors and equipment suppliers. It is not possible to discern whether the beneficiary's duties as described comprised primarily managerial duties or whether the beneficiary performed operational tasks associated with his position. The petitioner's breakdown of the beneficiary's duties for the foreign entity in this initial position shows that the beneficiary spent 20 percent of his time assigning tasks and reviewing the performance and quality of the assignment; thus the beneficiary did not spend a majority of his time on supervisory duties.¹ Counsel confirms on appeal that the beneficiary's position was not primarily a supervisory position. As the beneficiary did not spend the majority of his time supervising others, it is not necessary to discuss whether the beneficiary's subordinates held professional positions.²

The petitioner indicated that the beneficiary's tasks for his initial assignment with the foreign entity included spending 15 percent of his time defining implementation strategies according to a function leaders' specifications, 15 percent of his time coordinating activities between teams, 15 percent of his time coordinating efforts between the software factory and clients, 10 percent of his time establishing development schedules, 10 percent of his time coordinating the implementation of backup procedures and security access controls to the information stored by the system, and 10 percent of his time developing components and procedures. These duties describe an individual performing various necessary tasks to structure this particular project. However, 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 record does not include sufficient evidence to substantiate that the beneficiary's duties were primarily managerial when he began work for the foreign entity. The petitioner's classification of all the beneficiary's initial duties as managerial is not credible. Going on record without supporting documentary evidence is not sufficient for purposes of meeting

¹ The AAO observes that the beneficiary's subsequent duties for the foreign entity likewise did not include primarily supervisory duties.

² The AAO observes that the director's statement that first-line supervisors are not considered managerial employees is incomplete. Section 101(a)(44)(A)(iv) of the Act, states: "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." The director's failure to acknowledge that a first-line supervisor of professional employees is considered a manager is improper and misleading and will be withdrawn.

the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *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 foreign entity were primarily managerial duties or that he was employed by the foreign entity for one year prior to entering the United States as a nonimmigrant.

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.