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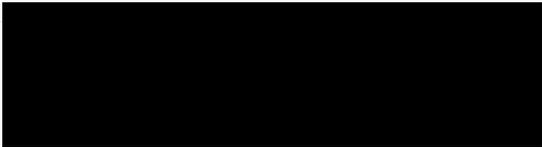
FILE: [Redacted]
WAC 03 203 52791

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 engaged in the distribution of networking and computer products. It seeks to employ the beneficiary as its director of sales and marketing. 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.

On appeal, counsel disputes the director's conclusions and submits a brief in support of her 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 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 issue in this proceeding is whether the beneficiary would be performing 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 a list of eight responsibilities attributed to the beneficiary. As that list has been incorporated into the director's denial, the AAO need not repeat it in this decision. The petitioner also provided an organizational chart naming three subordinates under the director's position. The chart also indicated that each of the beneficiary's named subordinates had a subordinate employee of his/her own.

On July 19, 2004, the director issued a request for additional evidence (RFE) instructing the petitioner to submit an organizational chart illustrating its hierarchical structure as of the date the petition was filed. The director specified that the petitioner should clearly identify the beneficiary's position and the positions of his subordinates by employee name and position title providing each employee's job duties and educational levels. The petitioner was also asked to submit its Form DE-6 quarterly wage reports for the last three quarters of 2003 and the first quarter of 2004.

The petitioner responded with the requested information, which included a copy of the original organizational chart and a separate list of employees as well as brief lists of their respective job duties.¹ Based on the petitioner's organizational chart, the beneficiary's subordinates would include a sales manager, a marketing manager, and a technical support employee. The petitioner also submitted its third quarter DE-6 wage report for 2003, which accounts for employees that worked for the petitioner at the time the petition was filed. It is noted that the report contains the names of two out of three of the beneficiary's subordinates. Although the name of the technical support employee is included in the petitioner's second and fourth quarter DE-6 wage reports for 2003, that individual is not included in the petitioner's third quarter DE-6 report for 2003. Thus, it does not appear that this employee worked for the petitioner at the time the petition was filed in July of 2003.

The petitioner also provided brief lists of duties for each employee whose position was either directly or indirectly subordinate to the beneficiary's. The sales and marketing managers, both immediate subordinates of the beneficiary, were charged with sales related duties, which are geared to sell the petitioner's product, and marketing duties, which are geared to advertise the petitioner's product in order to increase sales. As the petitioner's Form DE-6 Form does not include the name of the petitioner's technical support employee, the AAO is unclear as to who was performing the duties that are assigned to this position.

On October 7, 2004, the director denied the petition noting that the petitioner's organizational chart and its third quarter wage report for 2003 did not match, as several of the employees listed in the chart did not appear in the wage report and vice versa. The director also concluded that the petitioner's descriptions of duties of the beneficiary's subordinates do not require a bachelor's degree. Therefore, the employees who carry out these duties cannot be deemed professional.

On appeal, counsel explains that the two top executives named in the organizational chart do not appear in the petitioner's quarterly wage reports because they are stationed at the parent company, which is located in Taiwan. Counsel also maintains that the individual originally named as technical support had been employed by the petitioner from the second quarter of 2003 through the first quarter of 2004. While counsel is primarily correct, a thorough review of the relevant wage report shows that [REDACTED] name is not included in the list of ten employees. Counsel further explained that two of the employees listed in the quarterly wage report, but whose names do not appear in the organizational chart are members of the board of directors and, therefore, do not engage in the petitioner's daily operational activities.

In regard to the beneficiary's role in the petitioner's overall organization, counsel provided the following statements:

- Sales and marketing director gives instructions to sales manager on what kind of strategies to implement and also what kind of distribution proposal to offer to new wholesalers (pricing strategy, marketing budget, sales promotion program, credit line, etc.)
- Sales and marketing director then approves or denies the proposal and orders received from our distributors.

¹ The petitioner did not submit the requested 2003 corporate tax return with its response to the director's RFE. Instead, the 2003 return was submitted separately one to two weeks after the RFE response. As all evidence submitted in response to an RFE "must be submitted at one time," the 2003 corporate tax return was not and will not be considered as part of the record. 8 C.F.R. § 103.2(b)(11).

- Order are [sic] approved by [the] sales and marketing director. The order is then passed to the marketing manager

While the above statements and the previously submitted list of responsibilities generally indicate that the beneficiary's discretionary authority fits the definition of managerial or executive capacity, these definitions are meant to serve only as guidelines to be applied to a specific list of duties. 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). 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. In the instant matter, the petitioner provided an organizational chart and described the duties of the beneficiary's subordinates. While this information is clearly relevant, it must be reviewed in the context of the beneficiary's own list of duties, which must convey the activities the beneficiary carries out daily and how much of the beneficiary's time is consumed performing qualifying tasks versus nonqualifying tasks. As the instant record of proceeding lacks a specific list of the beneficiary's duties, the petitioner has failed to answer a critical question: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). While the petitioner's organizational structure suggests that the beneficiary may be relieved from performing nonqualifying tasks, such a determination simply cannot be made without a detailed description of the beneficiary's proposed tasks, particularly in light of a lack of documentation to indicate that the petitioner had the necessary technical support employee in place at the time the petition was filed.

Although counsel provides the AAO with a list of personnel changes that have taken place since the petition was filed, these changes have no evidentiary weight for the purpose of determining whether the petitioner was eligible to classify the beneficiary as a multinational manager or executive as of the filing date 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, the only pertinent information is that which addresses the petitioner's personnel structure at the time the petition was filed. Any changes that occurred after that time are irrelevant in this proceeding.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. Although the record indicates that the beneficiary had a high degree of discretionary authority, it does not establish that a majority of the beneficiary's duties would be primarily those of a qualifying capacity. The record lacks sufficient information regarding the beneficiary's prospective duties. Thus, 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.

Notwithstanding the above conclusion, the AAO notes that the director erred in determining that the beneficiary would perform menial tasks. Based on the vague descriptions of the beneficiary's duties, the AAO cannot determine with any degree of certainty what duties the beneficiary would perform. The record simply lacks sufficient detail to make that kind of a determination. Therefore, the director's comment suggesting that the beneficiary would perform "menial tasks" is not an accurate reflection of the information on record and will hereby be withdrawn.

Nevertheless, 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.