

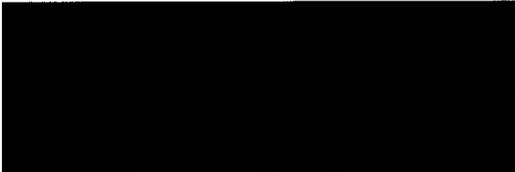
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U.S. Citizenship
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Services

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FILE: WAC 03 044 52145 Office: CALIFORNIA SERVICE CENTER Date: MAR 15 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, 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 Arizona in September 1988. It distributes components for the electronic and network industries and provides professional assistance and services. 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.

After requesting additional evidence, 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 did not apply the proper standard to determine the beneficiary's managerial capacity. The petitioner submits a brief and copies of distributorship agreements in support of the appeal.

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 May 28, 2002 letter appended to the petition, the petitioner stated that the beneficiary "will continue to be responsible to plan, direct and coordinate overall operations of [the petitioner], the contact point for future development & growth within the North American territory." The petitioner also listed the beneficiary's day-to-day duties as:

- (1) Confer with Parent Company and other affiliated companies to plan and establish corporate policies and objectives in terms of operations and sales;
- (2) Manage business relationships with ASSMANN production facilities to ensure appropriate collaboration, in accordance with corporate views;
- (3) Establish marketing and sales policies to further expand our sales and operations throughout the North American market;
- (4) Manage and lead sales personnel to ensure that they comply with every [sic] corporate standards and objectives;
- (5) Overview logistics operations and ensure coordination between sales & delivery operations;
- (6) Periodically review company's results and review operations in accordance with current status;
- (7) Represent ASSMANN Electronics for negotiation and closure of major partnerships and business agreements;
- (8) Provide managerial/executive assistance for any and all operations of the company; [and]
- (9) Maintain corporate relationships with top-line executives of ASSMANN KG.

On April 24, 2003, the director requested a copy of the petitioner's organizational chart describing its managerial hierarchy and staffing levels, as of the date of filing the petition, November 22, 2002. The director requested that the chart include the names of all executives, managers, supervisors, and number of employees within each department or subdivision. The director also requested a brief description of job duties, educational levels, salaries/wages for all employees under the beneficiary's supervision. The director further requested the petitioner's state quarterly wage reports for the last quarter of 2002 and the first quarter of 2003.

In response, the petitioner provided its organizational chart depicting its employees as of November 22, 2002 and as of February 2003. The petitioner's employees as of November 22, 2002 included the beneficiary in the position of vice-president, and his subordinates in the positions of chief financial officer, two inside/outside salesperson, an inside salesperson, and a warehouse, shipping, and receiving clerk. The petitioner's Arizona State Tax and Wage Report for the quarter in which the petition was filed confirmed that five of the petitioner's employees had received a salary for the quarter. The five individuals who had received salaries were holding the positions of vice-president (the beneficiary's position), chief financial officer, two inside/outside salespersons, and warehouse, shipping, and receiving clerk. The organizational chart shows that the chief financial officer and both of the inside/outside salespersons hold bachelor degrees.

The director determined that: (1) the description of the beneficiary's job duties did not establish that the beneficiary met the criteria outlined in the definition of executive or managerial capacity; (2) it was reasonable to believe that with the petitioner's organizational structure, the beneficiary would assist with the

day-to-day non-supervisory duties; (3) the beneficiary would not be supervising professional employees; and, (4) that the beneficiary did not qualify as a functional manager as he would be involved in performing routine operational activities rather than managing a function.

On appeal, the petitioner asserts that the beneficiary qualifies as both a functional manager and a manager of professional employees. The petitioner references the educational levels of the chief financial officer and the two inside/outside salespersons and asserts that the beneficiary exercises control and authority over these three professional-level employees. The petitioner avers that the beneficiary is a functional manager because: (1) the beneficiary is critical to the company as the highest-level manager in the organization; (2) he is in charge of developing, implementing, and managing the petitioner's marketing and sales strategy; and, (3) the principal function of the company is sales and marketing of products to the U.S. market. The petitioner also submits distribution agreements to demonstrate the beneficiary's authority to bind the company and to show that the petitioner provides indirect employment to other workers in the United States. The petitioner also references three unpublished decisions. The petitioner contends that the director did not consider the petitioner's reasonable needs, its overall purpose, and its stage of development when analyzing the petitioner's organizational structure.

The petitioner's assertions 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 initially did 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 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. On appeal, the petitioner clarifies for the first time that the beneficiary will be engaged in primarily a managerial capacity.

In the petitioner's description of the beneficiary's duties, the petitioner states that the beneficiary confers with others to plan and establish corporate policies and objectives in terms of operations and sales, as well as, establishes marketing and sales policies to further expand sales and operations. These phrases do not sufficiently define the beneficiary's actual duties but rather paraphrase an element contained in the statutory definition of executive capacity. *See* section 101(a)(44)(B)(ii) of the Act. 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).

Moreover on review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary "[m]anage[s] business relationships with ASSMANN production facilities to ensure appropriate collaboration, in accordance with corporate views," and "[p]rovide[s] managerial/executive assistance for any and all operations of the company." These general statements do not establish whether the beneficiary's duties are primarily managerial or executive duties or are duties associated with the petitioner's

daily operations. 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). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Further, any detail the petitioner provides regarding the beneficiary's overall duties is more indicative of an individual involved in the petitioner's operational or supervisory tasks. For example, the petitioner states that the beneficiary "[r]epresent[s] ASSMANN Electronics for negotiation and closure of major partnerships and business agreements," and "[o]verview[s] logistics operations and ensure[s] coordination between sales & delivery operations," and "[m]anage[s] and lead[s] sales personnel to ensure that they comply with every [sic] corporate standards and objectives." 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's organizational structure shows that the beneficiary was a first-line supervisor 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). 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)(iv) of the Act.

The petitioner's assertion that the three of the beneficiary's five subordinates are professional employees is not persuasive. When evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Thus, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the petitioner has not, in fact, established that an advanced degree is actually necessary to perform the petitioner's sales activities.

Of note, despite the director's specific request for the information in a request for evidence dated April 24, 2003, the petitioner has not provided descriptions of the beneficiary's subordinates' job duties. Again, 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 at 190. The titles of the sales personnel indicate that these individuals are involved in sales. The record does not contain any evidence regarding the chief financial officer's duties and his title is not sufficiently explicit to determine his job duties.

It is not possible to ascertain whether the chief financial officer's position requires someone with a professional degree or whether this position is a position that requires the skill of a bookkeeper or accounting clerk. Although the director specifically requested a brief description of all subordinate employees' job descriptions, the petitioner failed to submit any job descriptions. A failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner's claim that the beneficiary is a functional manager is not persuasive. The petitioner indicates that the principal function of the company is sales and marketing of products to the U.S. market and that the beneficiary is in charge of developing, implementing, and managing the petitioner's sales and marketing strategy. However, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because the record shows that several of the beneficiary's tasks, such as, negotiating contracts, supervising salespersons, and marketing products and services are operational tasks. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Further, as observed above, the petitioner has not provided a comprehensive and detailed description of the beneficiary's daily duties. The job description provided does not demonstrate that the beneficiary manages the function rather than performs the duties relating to the function. Again, 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 at 604. The failure to document the proportion of time the beneficiary spends on managerial functions and the lack of specificity of the beneficiary's and his subordinates' job descriptions does not support a conclusion that the beneficiary is primarily performing the duties of a manager of an essential function.

Finally, as required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The AAO observes that it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size or the absence of employees who would perform the non-managerial or non-executive operations of the company. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of the petitioning enterprise's overall purpose and stage of development. In this matter, the petitioner has failed to adequately support the claim that the beneficiary is relieved from performing operational tasks and the duties of a first-line supervisor of non-professional employees. The petitioner has failed to articulate how the petitioner's reasonable needs justify the beneficiary's performance of non-managerial or non-executive duties.

Of note, the petitioner's reference to unpublished decisions is not relevant to this proceeding. Although 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will include 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.