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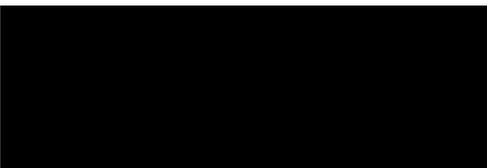
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: MAY 10 2005

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IN RE:

Petitioner:



Beneficiary:

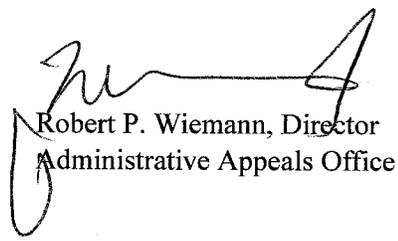
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 New York in October 2000. It distributes magazines. It seeks to employ the beneficiary as its chief executive. 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 arbitrary and capricious and that the company is ready, able, and willing to employ the beneficiary in an executive/managerial capacity.

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 December 12, 2002 letter appended to the petition, the petitioner stated that: "As Chief Executive, [the beneficiary] is responsible for direct profitability of the company as well as expansion of the company activities." The petitioner added that: "[the beneficiary] will also be responsible for the supervision, direction, and management of three subordinate employees."

The petitioner also provided its organizational chart showing the beneficiary in the positions of vice-president, finance and accounting head, and marketing and operation head. The organizational chart showed that a delivery manager and a source manager reported to the beneficiary in his position as head of the marketing and operation department. The petitioner's New York Form NYS-45, Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return, for the quarter ending prior to the petition's filing date confirmed the employment of the beneficiary and the individuals in the positions of delivery manager and source manager.

On July 17, 2003, the director requested further evidence on the issue of the beneficiary's managerial or executive capacity. The director requested: a comprehensive description of the beneficiary's proposed duties; a list of all employees identifying each employee by name, position title, brief position description, educational level, and salary; and, Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to the petitioner's employees in 2002.

In an October 8, 2003 response, counsel for the petitioner acknowledged that the beneficiary was responsible for supervising two employees but that the company was in the process of hiring a sales representative. Counsel also provided a lengthy but general description<sup>1</sup> of the beneficiary's proposed job duties and asserted that the description more than satisfied the statutory definition for executive capacity. Counsel submitted a chart identifying the beneficiary's subordinates<sup>2</sup> as the delivery manager and the sourcing manager. The petitioner described the delivery manager's duties as "managing customers with sales of the products through delivery man on contract basis; responsibility [sic] to collect dues from customers." The petitioner described the sourcing manager's duties as "manage obtaining new magazine buyer accounts; managing to introduce new titles under various faculty in the market." The petitioner also provided its 2002 IRS Forms W-2, confirming the employment of the individuals identified as the delivery manager and sourcing manager some time during the 2002 year.

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<sup>1</sup> The director recites counsel's description of the beneficiary's duties in its entirety in her decision. Counsel's description listed each of the elements contained in the definitions of executive and managerial capacity and claimed that the beneficiary performed each of the elements without providing detail of the beneficiary's actual day-to-day tasks and without quantifying the time the beneficiary spent on his tasks. As the record contains the entire description, it will not be repeated here.

<sup>2</sup> The petitioner also listed a sales representative as the beneficiary's subordinate. However, the record does not evidence the employment of the sales representative when the petition was filed, thus the sales representatives duties are not relevant to this proceeding. 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 director determined that: (1) the petitioner's description of the beneficiary's duties failed to describe the beneficiary's actual day-to-day duties; (2) the record did not support the petitioner's contention that its sourcing manager and delivery manager managed essential functions through the delegation of duties to outside contractors and representatives of third party companies; and (3) the beneficiary would be engaged primarily in the non-managerial operational tasks and first-line supervisory duties over non-professional employees, rather than primarily managerial or executive tasks.

On appeal, counsel for the petitioner inserts arguments apparently submitted in response to the director's request for evidence in support of an L-1A classification for the beneficiary. Counsel asserts that: (1) the beneficiary manages the entire organization including discretionary authority in deciding the size and location of the premises, the target market, the pricing, the hiring and training, and the equipment; (2) the beneficiary manages the essential function of development and management of the United States joint venture; (3) has the sole authority to hire, fire, and make decisions regarding the roles of the petitioner's employees; and, (4) the beneficiary's tasks of establishing new business contacts, negotiating and finalizing contracts, and procuring orders from high-level customers are tangential tasks.

Counsel also contends that the beneficiary is managing other managers and that the size of the organization should not prejudice the petition for this immigrant visa classification. Counsel concludes that the beneficiary functions at a senior level in the organizational hierarchy and that he was sent to the United States with funds that permitted him, with full discretionary authority, to purchase and initiate business activities, lease and secure premises over a long term, and hire, fire, and train any number of employees for whatever positions he deems appropriate. Counsel asserts that the beneficiary meets the definition of a manager.

Counsel'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 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 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.

Counsel seems to imply that managing an organization constitutes management of an essential function. However, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Moreover, as the director observed, the petitioner's description of the beneficiary's duties generally paraphrased elements of the definition of managerial and executive capacity without conveying an understanding of the beneficiary's actual duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Counsel also seems to imply that the beneficiary's two subordinates manage essential functions. However, the descriptions of the beneficiary's subordinates' duties depict individuals performing operational tasks. Further, as the director observed, the petitioner fails to support its claim that its sourcing manager and delivery manager manage their "functions" through delegation of non-qualifying duties to others. The record contains no evidence that the petitioner outsources operational tasks to contractors. 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 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.