

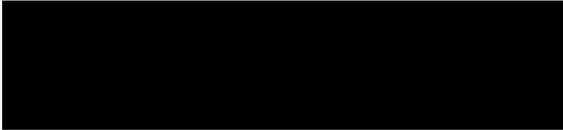


U.S. Citizenship
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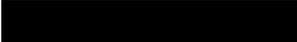
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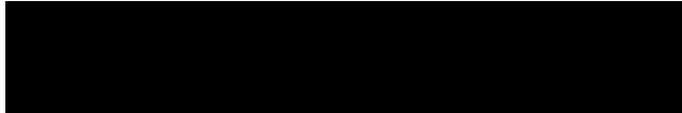
Office: TEXAS SERVICE CENTER

Date: NOV 25 2005

SRC 04 088 51648

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, Texas 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 Florida in January 2002. It is the managing partner of a 50-50 joint venture that provides industrial decontamination services to hospitals and other healthcare providers. It seeks to employ the beneficiary as its 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 petitioner.

On appeal, counsel for the petitioner asserts that the beneficiary qualifies as a functional manager

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. For the first time on appeal, counsel argues that the beneficiary qualifies as a functional manager; however counsel also recites portions of the definition of executive capacity and claims that the beneficiary also provides these services to the petitioner.

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 February 3, 2004 letter appended to the petition, the petitioner indicated that the beneficiary's responsibilities are clearly at the executive and/or managerial level and include the following duties:

- Oversee the continued development of company's commercial decontamination service business, focusing on expansion throughout Florida and the Southeast.
- Manage the sale and distribution of the AQ-4000 machine and other decontamination equipment to healthcare providers.
- Supervise and coordinate activities of decontamination supervisors and subordinate technicians involved in decontamination service projects.
- Supervise the Sales Manager employed by the joint venture, including assigning potential customers for direct contact by Sales Manager, arranging for Sales Manager to provide live product demonstrations, and directing Sales Manager to attend industry gatherings and conferences.
- Direct the continued development of an administrative hierarchy, including the employment and training of a full[-]time office manager to coordinate office services, such as personnel, budget preparation and control, and marketing.
- Propose and implement the annual business plan for the company.
- Set policies to ensure petitioner fulfills all contractual obligations.
- Set policies to ensure petitioner complies with all relevant rules and regulations under U.S. and international law and, in particular, new JCHAHO infection prevention standards.

The petitioner indicated that the beneficiary focused on five areas: (1) customer development, which included overseeing all marketing activity, meeting with prospective customers, analyzing work to be performed, and formulating estimates for prospective projects; (2) project management, which included estimating the equipment, material, and workers required for each job, scheduling jobs, estimating the duration of each project to ensure the efficient use of the company resources, selecting materials suppliers, and negotiating favorable purchase terms; (3) staff supervision; (4) financial management; and, (5) strategic planning for the company.

On February 7, 2005, the director requested, among other things, a definitive statement describing the beneficiary's proposed position with the petitioner including: the position title; a list of all duties; the percentage of time spent on each duty; the number of subordinate managers/supervisors or other employees reporting directly to the beneficiary; a brief description of their job titles, and educational levels, or if the beneficiary would not supervise other employees, the essential function the beneficiary would manage; an organizational chart specifying the beneficiary's position within the organizational hierarchy; and, who provides the product sales/services or produces the petitioner's products. The director also requested Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, issued to all employees in 2004.

In an April 29, 2005 response, counsel for the petitioner provided the petitioner's list of the beneficiary's duties. The petitioner indicated that the beneficiary spent: 30 percent of his time on operations management which included oversight of the petitioner's decontamination service development, managing the sale and distribution of the AQ-4000 machine, and managing decontamination projects; 25 percent of his time on customer development which included meeting with professional and management level representatives of prospective customers; 15 percent of his time on product research and development which included working with new partners to develop, patent, manufacture, and distribute second generation equipment as well as new equipment; 15 percent of his time on worker supervision, which included supervising and coordinating decontamination supervisors and subordinate technicians, supervising the sales manager by assigning potential customers for her direct contact, arranging for her to perform live demonstrations of the equipment, and directing her to attend industry meetings; and, 15 percent of his time on financial and administrative supervision which included developing and monitoring budgets, reviewing monthly sales figures, activity reports, and financial statements, as well as setting policies.

The petitioner indicated that the beneficiary supervised four subordinates, including a sales manager, a supervising decontamination specialist, an equipment collection specialist, and a product design engineer. The petitioner noted that the decontamination specialist supervised several independent technicians. The petitioner provided IRS Forms W-2 issued in 2004 to three individuals employed through a staffing company but purportedly under the beneficiary's supervision and control. The IRS Forms W-2 showed the sales manager had received \$17,990 in wages, the decontamination specialist had received \$3,872 in wages, and an equipment collection assistant had received \$5,616 in wages.

The director denied the petition on May 9, 2005, determining that the proffered position was not a managerial or executive position. The director observed that the beneficiary and the sales manager were the only full-time employees and that although the beneficiary "evidently exercises discretion over the day-to-day operations of the activity," he also is performing most of the day-to-day duties of the business. The director concluded that it is reasonable to assume that the petitioner's business does not need a full-time executive to manage two to three full-time employees and make decisions regarding the company.

On appeal, counsel states that the petitioner is employing the beneficiary in a managerial capacity and that a functional manager need not oversee any employees but must manage an essential function within the organization. Counsel references three unpublished matters and claims that the unpublished matters are comparable to the matter at hand. Counsel also sets out "scenarios" which counsel claims show the beneficiary in an operational and policy management role. The "scenarios" include situations wherein the beneficiary demonstrated the petitioner's machine at various conferences and personally met with officials from hospital and healthcare centers to discuss and offer advice on the decontamination of medical equipment, obtained contracts for the use of decontamination equipment, and demonstrated decontamination equipment. Counsel asserts that the number of the petitioner's employees is not determinative, that the petitioner has employees to relieve the beneficiary from performing non-qualifying duties, and that the staff structure was reorganized based on the beneficiary's role as a functional manager. Finally, counsel submits letters from two professors, an owner of a contracting company, and a chief executive officer of a hospital, all providing opinions that the beneficiary is a "manager" and should be granted this visa classification.

Counsel's information and argument is not persuasive. First, counsel's citation to and comparison of this matter to unpublished matters carries little probative value. Counsel's recitation of the AAO's "opinions" is misquoted, taken out of context, and fails to provide facts in this matter that are analogous to those in the unpublished decisions. Further, counsel should take note that unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c). Second, when examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Upon review of the record in this matter and as discussed further below, the petitioner has not established that the beneficiary's duties comprise the management of a function or are otherwise managerial or executive.

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 seemed to suggest that the beneficiary would qualify as both a manager under section 101(a)(44)(A) of the Act, and an executive under section 101(a)(44)(B) of the Act. Counsel continues to use portions of the definition of executive capacity on appeal, even though counsel claims that the beneficiary is a "function manager." In any event, 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 review, the petitioner initially provided a general description of the beneficiary's duties, including oversight of the entire business, establishing policies, managing the sale of the petitioner's product, and supervising other workers. However, 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). Counsel and petitioner's more detailed description of the beneficiary's duties and evidence submitted to support the beneficiary's duties show the beneficiary involved in promoting, marketing, and selling the petitioner's product and services. For example, the petitioner indicates that the beneficiary spends 30 percent of his time on operational management and 25 percent of his time on customer development. The record demonstrates that the beneficiary is the individual responsible for demonstrating the petitioner's product and services and obtaining contracts for the petitioner's product and services. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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).

In addition, as the director observed and contrary to counsel's contention on appeal, the petitioner in this matter has failed to provide sufficient documentation to establish that it employed sufficient personnel to relieve the beneficiary from performing the routine administrative and operational tasks necessary to market, sell, schedule, and supervise each of the petitioner's decontamination projects. Again, the evidence in the

record, including letters and electronic mail from prospective and current customers show that the beneficiary is the individual who demonstrated the petitioner's product and service and obtained the contracts to perform the services. Further, the petitioner provides evidence of only two full-time employees 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 or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Although, the second employee is an individual ostensibly responsible for demonstrating and selling the petitioner's product and services, the evidence in the record contradicts her involvement in actually performing these duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In addition, the AAO acknowledges that the director should have more articulately discussed the beneficiary's duties and how the description failed to establish that the beneficiary's duties would be primarily managerial or executive. However, upon review of the totality of the record, the discrepancies between the description of the beneficiary's duties, the petitioner's type of business, the petitioner's acknowledgement and evidence that the beneficiary performs the routine operational and administrative tasks, and the absence of evidence confirming the employment of a sufficient number of individuals to relieve the beneficiary from performing the petitioner's day-to-day operations when the petition was filed, cast doubt on the legitimacy of the petitioner's offer of managerial or executive employment.

Further, 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, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's pragmatic duties of overseeing service personnel and promoting and selling the petitioner's product and services. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

Counsel's assertion that the beneficiary's position is a functional manager position is not persuasive. First, the AAO notes that it is not clear if counsel or the petitioner is claiming that the beneficiary's position comprises: (1) the duties of an executive directing the management of a function, establishing the goals and policies of a

function, exercising wide latitude in discretionary decision-making (as it relates to the function), and receiving only general supervision from higher level executives; or (2) the duties of a functional manager managing a function, which is an essential function, functions at a senior level with respect to the function, and exercises discretion over the day-to-day operations of the function. Again, a petitioner cannot combine portions of one definition with portions of the second definition and conclude that the beneficiary is eligible as a hybrid manager/executive.

Second, counsel has not specifically identified the "essential function" the beneficiary will manage. Stating, generally, that oversight of a business is the essential function is not sufficient. Again, specifics are required to establish managerial or executive capacity. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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. 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. *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. at 604. In this matter, the petitioner has not provided evidence that the beneficiary *manages* an essential function.

Again, counsel's citation to unpublished decisions does not support counsel's claim that the beneficiary will perform primarily managerial or executive duties for the petitioner. The facts provided in this matter, including the description of the beneficiary's duties, the lack of evidence substantiating the employment of sufficient personnel to relieve the beneficiary from performing operational and administrative tasks, and the description of the beneficiary's subordinates' duties, do not establish the beneficiary's eligibility for this visa classification.

Counsel's inclusion of letters offering opinions regarding the beneficiary's managerial capacity is not persuasive. The submitted letters do not take into account the statutory definitions of managerial and executive capacity, relevant case law interpreting these definitions, or the complete record of proceedings. The AAO may, in its discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). On review, the petitioner's evidence does not demonstrate that the beneficiary's actual duties comprise managerial or executive duties as defined in the statute and interpreted in case law. The petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will comprise primarily executive or managerial duties.

The petition will be denied for the above stated reason. 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.