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**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: TEXAS SERVICE CENTER

Date:

OCT 28 2005

SRC 04 202 52392

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:

SELF-REPRESENTED

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 AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Tennessee that is engaged in software development. The petitioner seeks to employ the beneficiary as its director of computer systems analysis and programming manager.¹

The director denied the petition concluding that the petitioner had not demonstrated that: (1) it had been doing business in the United States for at least one year prior to filing the immigrant petition; (2) the foreign entity is doing business; or (3) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, the petitioner challenges the director's findings, claiming that it submitted sufficient evidence to demonstrate the beneficiary's qualification for classification as a multinational manager. The petitioner maintains that the beneficiary is employed in a primarily managerial capacity, and further claims that both the United States and foreign entities have been operating in the field of software development. The petitioner submits a letter 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 or 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.

¹ The regulation at 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented "by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter." In this case, the person listed on the Form G-28 is not an authorized representative.

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 AAO will first address the issue of whether the petitioner was doing business in the United States for at least one year prior to the filing of the immigrant petition.

The regulation at 8 C.F.R. § 204.5(j)(2) defines "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petitioner filed the instant petition on July 19, 2004, noting that the petitioner established its software development business in the United States on August 4, 2000. In an attached letter, dated March 2, 2004, the petitioner further defined its operations as specializing in the "conception and development of software packages for the architectural design industry." As evidence of its business operations, the petitioner submitted: (1) its charter as a Tennessee corporation, minutes and by-laws; (2) a statement by the incorporator confirming the adoption of the petitioner's by-laws; (3) a "Business Information" Internet search, dated June 11, 2003, identifying the petitioner as an active organization in Tennessee; and (4) an income statement for January through October 2003.

The director issued a request for evidence on January 28, 2005 asking that the petitioner provide documentary evidence clearly showing "the scope and volume of business and staffing level of the petitioning U.S. enterprise during the one year immediately prior to the filing date of this I-140 petition." The director asked that the petitioner include with its response payroll records, federal tax reports, bank records, and any additional evidence that would document the petitioner's business operations during July 2003 through July 2004.

The petitioner responded in a letter dated March 22, 2005, explaining that its proximity to its United States customers has allowed the petitioning entity to further develop and achieve profitability as a software developer. The petitioner noted a 32 percent increase in its gross profit from the year 2003 to 2004, and submitted its unaudited financial statements as evidence of its growth. In support of its operations as "a corporation in good standing" in the United States, the petitioner again provided its Charter of Incorporation and Statement of Incorporator, as well as a July 4, 2005 business information Internet search. The petitioner noted its "successful completion" of design software, which allows the user to build a virtual model of a construction project, and an additional program that transforms the model into a three-dimensional reproduction. The petitioner claimed that the evidence demonstrates that it has been engaged in "regular, systematic and continuous business" operations since its establishment in 2000.

In a decision dated April 27, 2005, the director determined that the petitioner had not established that it had been doing business in the United States for the requisite time period prior to filing the petition. The director stated that the petitioner had failed to provide evidence of business transactions executed by the petitioner during the year prior to filing the immigrant petition, and did not submit "sufficient evidence of [its] staffing during the entire one year." The director noted that, although requested, the petitioner did not demonstrate

that "its staffing exceeded the 'mere presence of an agent or office' during the one year prior to the I-140's [sic] filing." Consequently, the director denied the immigrant petition.

In an appeal filed on May 25, 2005, the petitioner claims that it has been doing business in the United States for the requisite one-year period. The petitioner states that since August 2000, it has been in "good standing" as a Tennessee-based corporation, which the petitioner claims is evidenced in its submitted corporate charter, Statement of Incorporator, and the Tennessee "Secretary of State Business Information Search." The petitioner states:

[The petitioning entity] has been developing and selling software packages for the architectural design industry for the past five (5) years. This, in itself, is material and relevant evidence that the Petitioner is not a mere agent or office but an on-going business concern as those software solutions and packages are entirely developed and created in the United States by [the petitioning entity].

The petitioner again noted its 32 percent increase in gross profits as an indicator of its successful business operations in the United States. The petitioner provided essentially the same description of its software design packages as that noted in its March 22, 2005 letter.

Upon review, the petitioner has not demonstrated that it has been doing business for at least one year prior to the filing of the immigrant petition.

The petitioner did not submit sufficient evidence to demonstrate that it has been operating as a software developer from July 19, 2003 through July 19, 2004, the date on which the instant petition was filed. The regulation at 8 C.F.R. § 204.5(j)(3)(ii) grants to the director the authority to request additional evidence that she may deem necessary in determining a beneficiary's eligibility for classification as a multinational manager or executive. In accordance with the regulation, the director specifically requested that the petitioner provide its payroll and bank records, federal tax returns, and additional documentary evidence that would demonstrate its business of developing software. The petitioner neglected to supply the director with its payroll records or year 2004 corporate tax return. The AAO notes that although the petitioner references on appeal its 2004 tax return, the petitioner again failed to provide it for the record. Additionally, the petitioner failed to offer "any other documentary evidence" as requested by the director, such as service contracts, corporate brochures or company material explaining its software packages, which would document its business in the United States. The 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).

Among the documentary evidence provided, the petitioner's 2003 corporate tax return is incomplete, as it contains only the first page and has not been signed by a corporate officer. A complete corporate tax return is essential, as it provides a thorough picture of the petitioner's operations, including its business activity, assets, liabilities and compensation paid to employees or outside contractors. The petitioner's reliance on the "Business Information Search" of Tennessee companies is unpersuasive, as the documented corporate history does not confirm the filing of an annual report for 2003, the relevant time period herein.² The AAO notes that

² The AAO recognizes a notation on the "Business Information Search" of a December 12, 2002 change in the petitioner's fiscal year closing. However, the petitioner offered no explanation as to whether its purported operations during 2003 are included in the filed 2004 annual report.

despite the director's reference in her April 27, 2005 decision to missing documentation, the petitioner did not provide new evidence on appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)).

Absent additional evidence, the AAO cannot conclude that the petitioner was doing business in the United States from July 2003 through July 2004. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the petitioner demonstrated that the foreign entity is doing business in Canada.

In its March 2, 2004 letter submitted with the immigrant petition, the petitioner stated that the foreign company is incorporated in the Province of Ontario and provides such services as software development and technical support. As evidence of the foreign entity's business operations, the petitioner submitted the foreign company's articles of incorporation, its office lease, and income statement for the ten months ending October 31, 2003.

In her January 28, 2005 request for evidence, the director asked that the petitioner provide "clear documentary evidence that the beneficiary's foreign employer continues to meet the 'doing business' requirement vis-à-vis a regular, systematic and continuous provision of goods and/or services with a staffing in excess of the mere presence of an agent or office." The director noted that the petitioner should submit such evidence as copies of the foreign corporation's bank records, invoices, tax returns, and any documents that "clearly [portray] the volume of business of the foreign employer."

The petitioner responded in a letter dated March 22, 2005, stating that since 1999, the foreign company has been developing architectural design software packages and offering customer support related to its programs. The petitioner explained that the foreign entity contracts with Canadian companies and individuals "for the analysis, design and development of complete software solutions" and is presently designing software solutions for Canadian and foreign clients. As evidence of the foreign entity's business, the petitioner provided the foreign entity's articles of incorporation, corporate lease agreement dated August 15, 1999, with a term of ten years, corporate tax return, balance sheet, dated February 28, 2005, and income statements ending October 31, 2003 and December 31, 2004. The petitioner noted in its letter that the financial statements reflect an approximately \$185,000 increase in the foreign company's gross profit from 2003 to 2004.

In the April 27, 2005 decision, the director concluded that the petitioner has failed to demonstrate that the foreign entity was operating in Canada. The director noted that the petitioner had failed to provide the foreign company's bank records, invoices, tax return, and additional documentary evidence, which would demonstrate "the volume of business of the foreign employer."

On appeal, the petitioner challenges the director's finding that the foreign entity is not doing business in Canada, essentially restating the claims made by the petitioner in its March 22, 2005 letter. The petitioner again references the foreign company's financial statements and 2004 corporate tax return, noting that the foreign company would not generate a profit if not for its business operations.

Upon review, the petitioner has not established that the foreign entity is doing business in Canada. As noted previously, the director has the authority to request documentation deemed necessary to establishing classification as a multinational manager or executive. *See* 8 C.F.R. § 204.5(j)(3)(ii). Here, the petitioner failed to submit relevant documentation, which would demonstrate the foreign entity's business operations in Canada. Specifically, the petitioner's reliance on the foreign entity's 2004 corporate tax return is unsupported, as the tax return has not been provided for the record. The foreign entity's 2004 tax return is particularly relevant, as it would represent the foreign entity's business operations during the time the immigrant petition was filed. Additionally, the petitioner did not submit the requested bank statements, company invoices, or "other documentary evidence," such as service contracts, that would represent the foreign entity's operations. Again, the 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 AAO notes that the director applied an undefined standard in her analysis of the petitioner's and foreign entity's business operations. The director required that the petitioner demonstrate "the volume" of the foreign entity's business. The petitioner need not be held to establishing an indeterminate level of business, yet should only be required to show that the foreign entity is performing "the regular, systematic and continuous provision of . . . services" in Canada. 8 C.F.R. § 204.5(j)(2). Regardless, as discussed previously, the petitioner did not present the requested relevant documentation that would establish the regular, systematic and continuous provision of services by the petitioner and the foreign entity.

Lastly, the AAO will address the issue of whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner noted on Form I-140 that the beneficiary would be employed in the position of director of computer systems analysis and programming manager at an annual salary of approximately \$87,300. In an attached letter, dated July 16, 2004, counsel for the petitioner stated that the beneficiary's proposed position is "clearly of senior managerial standing" as he would exercise the following responsibilities:

- a) Assume complete authority over all issues pertaining to software development, including and not limited to development team, support team, training team, and quality management team. In this regard, [the beneficiary] has authority over most of [the] Petitioner's employees. Indeed, product development is a major area of responsibility which involves all aspects of the activity.
- b) Plan and supervise the work of specialized professionals involved in all aspects of product analysis, development, implementation and support;
- c) Exercise [sic] wide latitude of discretionary decision-making through day-to-day activities, and he will ensure that budgetary requirements are met;
- d) Exercise authority in regard to hiring and firing, training, delegation of assignments, preferences and technical goals, discipline, promotion and remuneration.

In a separate letter, dated March 2, 2004, the petitioner outlined the daily job duties to be performed by the beneficiary. The AAO notes that as the petitioner's list includes essentially the same job duties as those provided by the petitioner in its response to the director's request for evidence, they will be stated below with the provided time allocations. The petitioner noted in its letter that the beneficiary is qualified to perform as the petitioner's director of computer systems analysis and programming manager as a result of his work experience with the foreign entity in a "senior managerial capacity," as well as his present employment with the petitioner in the same position. As additional evidence, the petitioner submitted an organizational chart depicting the beneficiary as the "Administrator/Director" over three software engineers, a technical support manager, two support technicians/quality assurance, and a support staff.

In her January 28, 2005 request for evidence, the director noted ambiguity in how the beneficiary's proposed position qualifies as a multinational manager or executive. The director asked that the petitioner "explain in greater detail how the bulk or primary component of [the beneficiary's] work consists of the first-line

supervision of employees who are themselves supervisors or managers or degreed professionals." The director noted that if the beneficiary's subordinates are not professionals, the petitioner should explain how the beneficiary primarily directs, controls or oversees the corporation or its major function or component.

In its March 22, 2005 response, the petitioner stated that in the position of "director of computer systems analysis and programming manager," the beneficiary would primarily perform "non-manual managerial office work" during which he would manage and supervise "all issues, matters and personnel involved in the analysis, development and implementation of our products." The petitioner outlined the following job duties and provided percentages for the amount of time per week the beneficiary would devote to each task:

- 1) Manage and supervise all activities, functions and personnel pertaining to the analysis, the development and the implementation of our products; (35%)
- 2) Assess and define budgetary needs of [the] entire department and budget accordingly; (5%)
- 3) Ensure that all activities fall in-line with said pre-defined budgetary requirements; (5%)
- 4) Ensure sound management of all resources put at his disposal; (5%)
- 5) Oversee, direct and review work of professionals and staff involved in analysis, development and implementation of [the petitioner's] products; (15%)
- 6) Review performances obtained by each employee and act accordingly; (10%)
- 7) Manage and direct relationships with new and existing clients; (15%)
- 8) Define managerial processes pertaining to clients['] relationships and supervise analysis of clients' needs [and] requirements as done by [the petitioner's] professionals; (5%)
- 9) Oversee needs in terms of personnel and hire and fire proper staff; (4%)
- 10) Report to the President of the company exclusively. (1%)

The petitioner stated:

Indeed, [the beneficiary] will devote his time to non-manual managerial office work. He will supervise one (1) manager and seven (7) professionals in the course of his employment. His supervision will intervene at all stages, i.e.: through the definition of their assignments, the planning of their work, the definition of their duties and the review of the tasks performed. Please note that these eight (8) employees come in addition to the staff responsible for handling administrative questions under his supervision. [The beneficiary] will also enter directly in contact with both existing and future clients and will directly negotiate the terms of future contracts. As such, he will have the power to legally bind our company. [The beneficiary] and his department will also function autonomously on a budgetary level, as he will determine the budget required for the adequate functioning of his department and staff

and will have complete budget managing responsibility in this regard. While discharging his duties, [the beneficiary] will directly contribute to the direction, control and oversight of our company as he will manage and direct all issues and personnel involved in the development of our software solutions. Hence, his presence and his activities are critical since our whole company, as any business organization, is relying on the performances of its products and on the overall satisfaction of its clients. Eventually, [the beneficiary] will be compensated for his senior managerial services in the amount of ninety-seven thousand four hundred and ninety-nine dollars (\$97,499.97) per year.

The petitioner noted that of the beneficiary's eight subordinate employees, one is employed as a manager and seven as "specialized professionals," of which three are degreed software engineers. The petitioner further noted that the beneficiary would have authority to manage his department's annual budget of \$625,000.

In her April 27, 2005 decision, the director concluded that the beneficiary would not be employed by the United States entity in a primarily managerial or executive capacity. The director stated that the beneficiary "will primarily act as a firstline supervisor of eight other employees." The director referenced the job description of the subordinate "technical support manager," stating that it "does not clearly show that the bulk of his/her job duties are managerial as opposed to daily productive tasks such as development and implementation of software solutions." The director also noted an overlap in the manager's job duties with those of the beneficiary. The director further determined that the lower-level employees supervised by the beneficiary are not managerial personnel. Consequently, the director denied the petition.

On appeal, the petitioner challenges the director's finding that the beneficiary is a first-line supervisor, rather than a "senior manager." The petitioner references the regulation at 8 C.F.R. § 204.5(j)(4)(i), stating that because the beneficiary supervises seven professionals he is not a first-line supervisor. The petitioner notes that of the seven professional employees supervised by the beneficiary, three are engineers, an occupation included in the statutory definition of "professional." The petitioner contends that the beneficiary's assignment satisfies the statutory requirements of "managerial capacity" as he: (1) manages the organization's product development; (2) supervises and controls the work of professional and managerial employees; (3) has the authority to hire and fire employees and recommend personnel actions; and (4) exercises discretion over the daily operations of his department. The petitioner stresses that the beneficiary manages all personnel and activities related to the creation and development of the petitioner's products. The petitioner states that in conjunction with this responsibility, the beneficiary ensures the proper allocation of his department's \$625,000 budget, oversees the department's human resources and its development of efficient business strategies, designates and reviews the tasks of the department's lower-level employees, and "acts as a legal representative of the corporation" with the power to bind the petitioner in contracts. The petitioner again provides an outline of the job duties described in the petitioner's March 22, 2005 letter. The petitioner also notes that the beneficiary's salary is commensurate to the prevailing wage for a senior managerial position.

On review, the petitioner has established that the beneficiary would be employed by the United States entity in a primarily managerial capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Based on the petitioner's representations, the beneficiary would devote approximately 69 percent of his time to managing the functions and personnel of the product development department, which would be performed by the beneficiary's subordinate software engineers and support technicians. As noted by the petitioner, the lower-level engineers may properly be considered "professionals" as their positions require specialized

instruction in a particular field. *See Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988). Additionally, the beneficiary is personally responsible for maintaining and allocating the department's \$625,000 budget, thereby representing his authority to direct the day-to-day operations of the department. The AAO notes that while the beneficiary would be responsible for personally meeting with new and existing clients, a function typically considered non-managerial, the petitioner clarified the beneficiary's role as a "representative" who is able to legally bind the company in contracts. Additionally, the beneficiary devotes only 15 percent of his time to performing in this capacity. Collectively, the beneficiary's responsibilities demonstrate that he would be employed in the United States organization in a primarily managerial capacity. As a result, the director's decision will regard to this issue will be withdrawn.

While the petitioner has established that the beneficiary would be employed in the United States in a primarily managerial capacity, the petitioner has not overcome the burden of demonstrating that it had been doing business in the United States for at least one year prior to the filing of the petition or that the foreign entity is doing business in Canada. Based on the foregoing discussion, the petitioner has not established its eligibility for the requested benefit. The AAO notes that the petitioner is not barred from filing a new immigrant petition requesting classification of the beneficiary as a multinational manager or executive.

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. Accordingly, the director's decision will be affirmed in part and the petition will be denied.

ORDER: The appeal is dismissed.