

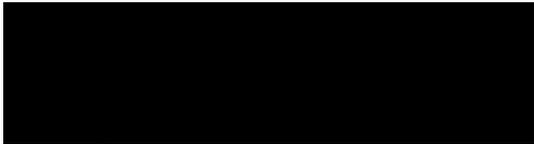


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FILE: EAC 04 197 50816 Office: VERMONT SERVICE CENTER

Date: SEP 14 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, Vermont 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 Connecticut that is operating as a private preparatory school. The petitioner seeks to employ the beneficiary as its principal.

The director denied the petition concluding that the petitioner failed to demonstrate that: (1) a qualifying relationship existed between the foreign and United States entities; (2) the United States company has been doing business; or (3) the beneficiary has been employed abroad and would be employed in the United States in a primarily managerial or executive capacity.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel claims that Citizenship and Immigration Services (CIS) erroneously interpreted the regulations governing the employment-based visa. Counsel challenges the director's analysis of the beneficiary's overseas employment, stating that the director failed to specifically consider the beneficiary's overseas employment as a principal.

Although counsel indicates that a brief would be submitted within thirty days, counsel did not indicate why the brief would be submitted late or otherwise provide good cause for the requested extension. As of this date, the record does not contain a supplemental appellate brief. The AAO notes that a request for a brief was sent via facsimile to counsel on August 10, 2005. Counsel responded that a brief and additional evidence would not be submitted.

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.

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.

Counsel did not address on appeal the director's findings that the beneficiary would not be employed in the United States in a primarily managerial or executive capacity or that a qualifying relationship failed to exist between the foreign and United States entities. As a result, counsel has conceded these issues. The record contains inconsistent evidence pertaining to the claimed parent-subsidary relationship. In its April 3, 2004 letter, the petitioner claims that the United States company is a wholly owned subsidiary of the foreign company, "Shingakusha Co., Ltd." The petitioner's stock certificate, however, identifies the company "Shinkensha Co., Ltd." as the owner of 100 shares of the petitioner's issued stock. As a result of the conflicting evidence, the AAO cannot conclude that the petitioning entity is a subsidiary of the beneficiary's foreign employer. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, 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)). Accordingly, the appeal will be dismissed based on these findings alone.

The AAO will address the issue of whether the beneficiary had been employed abroad 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 filed the petition on June 21, 2004. In an appended letter, dated April 3, 2004, the petitioner stated that from March 1997 through February 2001 the beneficiary was employed as the principal of the overseas school. The petitioner explained that as "the highest ranking executive in the school," the beneficiary held the following responsibilities:

- Manage and direct all academic, financial, personnel, and administrative activities of the Fuchu school;
- Supervise the day-to-day activities of the Vice Principal, Chief Instructor, Teachers, Administrators, and other professionals;
- Oversee and evaluate Fuchu school's educational curricula, teaching methods, and instructional materials to determine their effectiveness and suggest modifications for [the] Board's approval;
- Collaborate with Teachers and Chief Instructors to maintain high standards of the Shingakusha group, develop mission statements, and set performance goals and objectives;
- Determine and monitor allocations of funds for employee's salary and benefits, office supplies, instructional materials and equipment, etc. and authorize purchases;
- Oversee classes, evaluate teaching methods and recommend improvements to teachers and instructors as necessary;
- Maintain overall students attendance rates and progress reports to ensure academic improvements, and liaise with teachers and parents on necessary changes in students' environment;

- Manage the recruitment, hiring/firing, transfer of all teachers and chief instructors of Fuchu school, determine the need for personnel increases/decreases, and enforce discipline as necessary;
- Develop partnerships with businesses, communities, and other organizations to help meet identified educational needs and to provide school-to-work programs;
- Establish, coordinate, and oversee particular programs across school districts, such as programs to evaluate student academic achievement.

The petitioner further stated that while employed abroad, the beneficiary "acquired an advanced level of knowledge and expertise of [the foreign entity's] internally developed teaching methodology, planning and formulation of curriculum content, and [the foreign company's] meticulous student consultation and advisory procedures." The petitioner noted that as the foreign entity's principal, the beneficiary supervised eighteen lower-level employees, which the petitioner identified as holding bachelor's degrees.

In a decision dated October 21, 2004, the director determined that the petitioner had not demonstrated that the beneficiary was employed abroad in a primarily managerial or executive capacity. The director specifically concluded that the beneficiary had not been primarily performing executive or managerial job duties. The director noted that the petitioner's recitation of the regulatory definitions of "managerial capacity" and "executive capacity" is not sufficient to demonstrate that the beneficiary's job duties overseas involved primarily managerial or executive responsibilities. Consequently, the director denied the petition.

On appeal, counsel asserts that CIS erroneously interpreted the regulations and section 203(b)(1)(C) of the Act, which counsel notes requires an analysis of the nature of the beneficiary's employment prior to entering the United States. Counsel states:

The beneficiary was employed by the Japanese parent company and its branch schools for over 11 years. During the 4 years immediately prior to his admission into the U.S., the beneficiary headed the Japanese branch school as Principal, the highest ranking executive, directly supervising 18 managers and professionals. Yet [CIS] only reviewed his employment in the U.S. and erroneously determined that the beneficiary is ineligible to be classified in the EB-1 category.

On review, the petitioner has not demonstrated that the beneficiary was employed overseas in a primarily managerial or executive capacity.

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). Although the beneficiary's job description indicates that the beneficiary held managerial and executive responsibilities, the record does not adequately explain what the beneficiary primarily did on a daily basis. For example, the petitioner does not identify the specific job duties associated with "direct[ing] all academic, financial, personnel, and administrative activities," "supervis[ing] day-to-day activities of subordinate employees," or "oversee[ing] and evaluat[ing] [the foreign entity's] educational curricula, teaching methods and instructional materials." Nor does the petitioner outline which "particular [school district] programs" the beneficiary established and oversaw. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not

sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The record is equally lacking in the description of the personnel purportedly supervised by the beneficiary in his position as principal. Although the petitioner provided a list of subordinate managerial and "professional" employees in its April 3, 2004 letter, the petitioner did not submit an explanation of the positions held by each employee and the job duties performed. The AAO notes that the record contains a "company profile" of the foreign entity. However, because the company profile and attached documentation is not translated, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Documentation pertaining to the foreign entity's personnel is relevant in determining the managerial or teaching positions occupied by lower-level employees and evaluating whether the foreign entity maintained a staff sufficient to support the beneficiary in a primarily managerial or executive capacity. While the company's staff size alone may not be the sole factor in determining managerial or executive capacity, absent this evidence, the AAO cannot conclude whether the reasonable needs of the foreign entity were met by the employment of the beneficiary as principal and eighteen subordinate workers. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). 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. at 165.

Moreover, although both the petitioner and counsel assert that the lower-level employees are professionals as a result of holding a bachelor's degree, the petitioner has failed to provide documentation, such as college transcripts and diplomas, as evidence of completing the higher-level curriculum. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In 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).

Therefore, 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 case, as noted above, the petitioner has failed to describe the actual position held by the lower-level employees. Without this information, the AAO cannot evaluate whether a bachelor's degree is actually necessary. Therefore, there is insufficient evidence to conclude that the beneficiary's subordinates were professionals as claimed by counsel. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of

counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes the limited explanation offered by the director in his October 21, 2004 decision denying the instant petition. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Despite the brief decision, the director properly concluded that the petitioner's recitation of the statutory definitions of "managerial capacity" and "executive capacity" was not sufficient to establish that the beneficiary was performing primarily managerial or executive job duties while employed overseas. Thus, the director's findings will be affirmed.

However, 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence if the submitted evidence does not fully establish eligibility or raises questions regarding eligibility. The director did not request additional evidence in the present matter. As a result, the director's finding that the United States entity was not doing business for at least one year prior to filing the petition will be withdrawn.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.