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U.S. Citizenship
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FILE: WAC 04 113 53009 Office: CALIFORNIA SERVICE CENTER Date: **JAN 06 2006**

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.

6 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 sustained.

The petitioner is a corporation organized in the Territory of Guam in January 2000. It is an international freight forwarder. It seeks to employ the beneficiary as its general manager. 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 had been employed in a managerial or executive capacity by the foreign entity or would be employed in a primarily managerial or executive capacity for the United States petitioner.

On appeal, counsel for the petitioner asserts that the director's denial is arbitrary, capricious, and not supported by substantial evidence. Counsel submits a brief 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 had been employed in a managerial or executive capacity for the foreign entity and will be employed in a managerial or executive capacity for the United States entity. The petitioner provided the same job descriptions for both the beneficiary's foreign position and that of the proposed position with the petitioner. The petitioner requests consideration of the beneficiary's classification as a multinational manager. On appeal, counsel asserts that the beneficiary's job duties also satisfy the criteria set out in the executive capacity definition.

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 an undated letter appended to the petition, the petitioner indicated that the beneficiary would be employed in a managerial capacity, managing all aspects of the petitioner's business including over 27 employees.¹ The petitioner added that the beneficiary would supervise and control the work of other professional and supervisory employees, managing all essential functions of the petitioner, have the authority to hire and fire employees, and exercise discretion over the day-to-day operations of the business. The petitioner also attached a description² of the position of general manager that indicated the general manager would be "responsible for setting up the company and overall operations and supervision of all fasset [sic] of works."

The petitioner also provided its organizational chart³ depicting the beneficiary as the general manager over seven departments, including: (1) airfreight department consisting of a manager, an assistant, a supervisor and a clerk; (2) ocean freight department consisting of a manager/inbound clerk, outbound clerk and two drivers; (3) warehouse department consisting of a manager and three helpers; (4) trucking department consisting of a manager, an expediter, and two drivers; (5) sales department consisting of three salespersons; (6) finance and administration department consisting of a manager, an accountant, and an assistant; and, (7) "Mell" department consisting of a manager, shipping inbound assistant, shipping outbound assistant, and shipping operations assistant.

On January 11, 2005, the director requested a more detailed description of the beneficiary's duties including what the beneficiary would do in the day-to-day execution of his position, whom the beneficiary directs including their job title and position description, and the percentage of time the beneficiary spends in each of the listed duties.

On April 1, 2005, the petitioner provided a revised job description for the beneficiary's foreign position and proposed position. The petitioner indicated that the beneficiary had and would:

- Plan, organize, direct, control and evaluate divisions responsible for coordinating, arranging and monitoring the transportation and movement of goods
- Arrange for shipping documentation and oversee the scheduling and dispatching of goods and the tracking and tracing of goods in transit
- Set performance goals, oversee the setting of transportation service rates and monitor revenue and push sales and marketing plan. [sic]
- Develop plans and procedures for the transportation and storage of goods

¹ The petitioner did not identify the number of employees under the beneficiary's supervision when he was employed with the foreign entity.

² The petitioner attached the beneficiary's resume that indicated the beneficiary had been employed for the foreign entity as a general manager and listed the same description as that provided for beneficiary's position with the petitioner.

³ The petitioner initially did not provide an organizational chart for the foreign entity.

- Negotiate with carriers, warehouse operators and insurance company representatives for services and preferential rates
- Control the departmental budget
- Recruit personnel and oversee their training.

The petitioner provided brief job descriptions for the individuals directly reporting to him. The petitioner also provided a breakdown of the beneficiary's duties as:

Hire and Fire Staff	10%
Meet with major customers and negotiate contracts	5%
Supervise work of subordinate managers	50%
Explore potential additional product lines	5%
Manage all aspects of business	20%
Set policies to insure profitable operation of business	10%

The petitioner also provided the foreign entity's organizational chart depicting the beneficiary in the position of general manager over: the operations division made up of the trucking department, motor pool department, warehouse department, and "Mell" department, the ocean freight department/administrative division, airfreight department, accounting division, and marketing division. The petitioner provided brief job descriptions for the individuals directly reporting to him and also listed the same allocation of time and duties for the beneficiary's foreign position.

On May 20, 2005, the director denied the petition, determining that: (1) the percentage of time the petitioner had allocated to the beneficiary's supervision of subordinate managers would be time spent on executive type functions, that 10 percent of his time spent on hiring and firing employees did not seem likely, and that 5 percent of his time appeared to be involved in routine operational activities rather than in the management of a function such as negotiating contracts with customers; and, (2) the description of the beneficiary's duties was not comprehensive.

On appeal, counsel for the petitioner asserts that the job descriptions provided in response to the director's request for further evidence are a more detailed description of the beneficiary's duties and list all divisions, names, and responsibilities of the divisional managers under the beneficiary's supervision. Counsel also notes that if the director had reviewed the entire record, it would be easy to see that the petitioner is a component of a sophisticated corporate conglomerate and easy to conclude that the beneficiary is qualified as an international manager. Counsel also notes that the director failed to explain why prior L-1A intracompany transferee petitions had been approved based on the same managerial/executive criteria.

Counsel's assertion is persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's initial description of the beneficiary's duties was general and did not differentiate between the beneficiary's managerial duties and the beneficiary's non-managerial duties. The petitioner's second iteration of the beneficiary's duties, however, provided a description that more clearly defined the beneficiary's actual duties. Most importantly, the petitioner has provided evidence of the

beneficiary's subordinates and their subordinates duties. Contrary to the director's tortured reasoning, the AAO finds the petitioner's allocation of the beneficiary's time reasonable based on the petitioner's organizational structure. Further, Citizenship and Immigration Services (CIS) should not hold a petitioner to an unsupported and speculative view of the petitioner's business practices. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Although the beneficiary spends some time performing routine operational paperwork functions, the beneficiary in both the foreign position and the proposed position is primarily supervising other employees and other aspects of the business. Although the AAO would prefer that the petitioner and the foreign entity support the number of employees claimed, with Quarterly Wage Reports, Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, and payroll records, the director did not request such evidence. However, upon review of the totality of the record, including the petitioner's description of the beneficiary's duties, the petitioner's organizational chart, the presence of other employees to relieve the beneficiary from performing operational duties, the brief job descriptions of the beneficiary's subordinates, and the nature of the petitioner's business, the evidence is sufficient to demonstrate that the beneficiary is a mid-level manager supervising other supervisors and managers.

A critical analysis of the nature of the petitioner's business strengthens counsel's claim that the beneficiary managed the foreign entity and manages the petitioner's office through the employment of a number of subordinate employees. As can be seen from the foreign entity and the petitioner's multi-layered managerial structure the beneficiary's position was senior within the organizational management hierarchy and with respect to the company's other employees.

Despite the beneficiary's managerial title, the petitioner's claim that the beneficiary qualifies as an executive is most persuasive. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the beneficiary may qualify as either a manager or executive under the statute, the beneficiary's position within the petitioner's complex organizational hierarchy leads the AAO to conclude that the beneficiary primarily serves in an executive capacity.

Of note, the approval of other petitions involving managerial or executive capacity is not probative in this matter. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The prior approvals are separate records of proceeding, not part of the current record, and the AAO will not consider the prior approvals in the adjudication of this appeal. In this matter, however, the record before the AAO contains sufficient evidence to overcome the director's decision on the issues of the beneficiary's managerial and executive capacity for the foreign entity and the petitioner.

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 been met.

ORDER: The appeal is sustained.