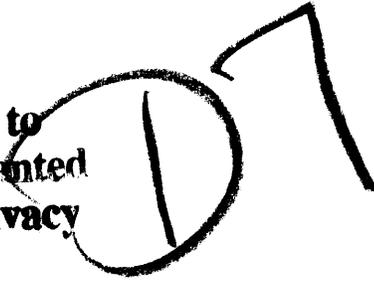


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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



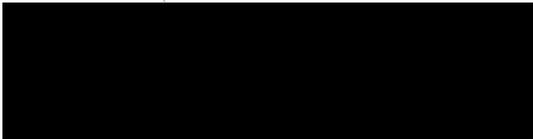
File: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date: **MAR 25 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, California Service Center denied the employment-based visa 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 California in July 1999. It sells and services computer and network-related components and peripherals. 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 managerial or executive capacity for the United States entity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, the petitioner asserts that the director considered only parts of the record and disregarded other parts. The petitioner also observes that the director did not request additional evidence and contends that this failure conflicts with 8 C.F.R. § 103.2(8).

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 AAO will first address the procedural issue regarding the director's declination to request further evidence prior to making his determination.

The regulations at 8 C.F.R. § 204.5(j)(3) states:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
 - (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
 - (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
 - (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
 - (D) The prospective United States employer has been doing business for at least one year.

The regulation at 8 C.F.R § 103.2(b)(8) states in pertinent part:

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by [CIS] prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence, including blood tests.

A review of the initial record does not present evidence of ineligibility and shows that the petitioner supplied preliminary evidence on the necessary elements of eligibility for this visa petition. The petitioner provided

evidence that the beneficiary had been employed in a managerial capacity for the foreign entity for one of three years prior to entering the United States. The petitioner provided preliminary documentary evidence of a qualifying relationship between the petitioner and the beneficiary's foreign employer. The petitioner provided a description of the beneficiary's proposed duties for the petitioner and supplied documentary evidence that it employed as many as 10 employees in the quarter previous to the petition's filing. The petitioner provided preliminary evidence that it had been doing business in a regular, systematic, and continuous manner for one year prior to filing the petition. Finally, the petitioner provided some evidence of its ability to pay the beneficiary the proffered annual wage of \$36,000. However, the evidence submitted did not fully establish eligibility and raised underlying questions regarding eligibility. Based on the preliminary evidence submitted in this matter, the director should have requested additional evidence but was not required to do so. The mandatory language in 8 C.F.R. § 103.2(b)(8) requires the director to issue a request for further evidence only when initial evidence or eligibility information is missing.

The first issue on the merits of this matter is whether the petitioner has established that the beneficiary will be employed in a managerial capacity. The petitioner bases its appeal solely on the beneficiary's managerial 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. 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.

The petitioner listed the beneficiary's duties as:

- 1) Overseeing operation of all 7 departments within the corporation, including management dept., production dept., and product dept. Report directly to President of the Group.
- 2) Setting all of the operational policies of the departments and determine production and sales target figures.
- 3) Analyze the corporation's condition to develop marketing strategies and make necessary adjustments in business plans and expansion plans.
- 4) Develop comprehensive annual objective plans for each department and oversee the implementation process.
- 5) Oversee and evaluate the work of 1st level management personnel and authorize rewards.
- 6) Responsible for hiring, firing, promoting, demoting, assigning, and rewarding authorization of all 1st and 2nd level management personnel.
- 7) Evaluate and authorize approval annual budgets and all large expenses of departments.
- 8) Act as final authorized signatory for all major contracts and handle complaints from major clients.
- 9) Evaluate and authorize approval of expenses reported by 1st level management personnel.

The petitioner also provided a copy of its California Form DE-6, Employer's Quarterly Wage Report, showing that it employed nine people in December 2002. The petitioner also included a copy of its 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The IRS Form 1120 showed \$119,483 paid in salaries for the year.

The director, without requesting further evidence, determined that the petitioner employed only 10 individuals and that standard business logic did not require a company of this size to have an executive. The director also determined that, because the petitioner had only nine employees in addition to the beneficiary, the beneficiary would necessarily be performing numerous day-to-day operational tasks. The director further determined that the beneficiary would be, in essence, a first-line "manager" of non-professional employees. Finally, the director determined that the petitioner had not established that the beneficiary would manage or direct a function of the petitioner but would primarily perform the petitioner's routine operational activities.

On appeal, the petitioner concedes that the burden of proof rests with the petitioner but asserts that the director did not consider the entire record. The petitioner claims that the beneficiary does supervise and control the work of managers and professional employees. The petitioner submits its organizational chart, the job duties of the claimed professional positions, and qualification documents of the petitioner's professional employees.

The petitioner correctly observes that the director's decision suggests the director did not review the entire record. Moreover, the director's undefined and unsupported views that a company with 10 employees would not need an executive and that the beneficiary would necessarily assist in day-to-day non-qualifying duties because the petitioner is small 10-employee company is improper. The director did not articulate a rational basis for finding the petitioner's number of staff to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The director does not substantiate his conclusion that the beneficiary would be required to

perform non-qualifying duties. The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act.

The petitioner's organizational chart shows the beneficiary as president with two departments reporting to him. The sales department consists of a sales manager with three sales associates and one technical sales engineer reporting to the sales manager. The service support department consists of an inventory database administrator, an inventory technician/programmer, an FAE, and an accountant.

On appeal, the petitioner claims that the inventory database administrator, inventory technician/programmer, and technical sales engineer are all professional positions. The petitioner also contends that the sales manager who supervises the work of the claimed professional technical sales engineer is a manager for immigration purposes.

The petitioner's assertions are not 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. § 214.2(l)(3)(ii). The petitioner initially did not indicate if the beneficiary's position would be primarily managerial pursuant to section 101(a)(44)(A) of the Act or primarily executive pursuant to 101(a)(44)(B) of the Act. A beneficiary may not claim 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.

The petitioner's description of the beneficiary's duties includes overseeing all departments, setting policies, and developing plans for all the departments. These statements paraphrase elements of the definition of executive capacity. *See* section 101(a)(44)(B)(ii) of the Act. The petitioner states that the beneficiary would be responsible for hiring, firing, promoting, and demoting all personnel. This duty paraphrases section 101(a)(44)(A)(iii) of the Act. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner also states that the beneficiary would determine production and sale targets, analyze the corporation to develop marketing strategies, sign contracts, and handle customer complaints. It is not possible to discern from this broad characterization of duties whether the beneficiary would be performing managerial or executive duties for the petitioner or whether the beneficiary would be performing the petitioner's operational tasks. 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).

The petitioner also claims that the beneficiary will spend some portion of his time evaluating the work and authorizing expenses reported by first level management personnel. However, based on the current record, the AAO is unable to determine whether these supervisory duties constitute the majority of the beneficiary's duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's

duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

On appeal, the petitioner focuses on the beneficiary's management of professionals and a claimed manager but fails to quantify the time he spends managing these subordinates. This failure of documentation is important because several of the beneficiary's daily tasks, as observed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot conclude that the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava, supra*.

The AAO recognizes that the description and qualifications of the inventory database administrator and the inventory technician/programmer may be professional positions. However, the current descriptions of duties for these two positions suggest that an individual's technical training and skill, not knowledge or learning gained by a prolonged course of specialized instruction and study would suitably fulfill the requirements of these positions. *See 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).

The AAO cannot conclude from the description of the duties for the technical sales engineer that this job is a professional position. The duties, including the gathering of technical data, providing technical information, and helping buyers with technical problems, describe a position that requires some technical expertise but not to the degree required of a professional. Moreover, the petitioner again does not quantify the amount of time the individual in this position spends on technical issues and the amount of time spent on selling the organization's products.

Further, the AAO cannot conclude that the sales manager is a manager for immigration purposes. The petitioner does not contend that the sales manager's duties comprise primarily supervisory duties and the AAO declines to speculate that the sales manager performs primarily supervisory duties.

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary's assignment is in a primarily managerial capacity.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. The petitioner on appeal provided copies of wire transfers establishing that the foreign entity in this matter funded the petitioner's capitalization in 2000. The record does not contain inconsistencies or other evidence casting doubt on the validity of the documentary evidence submitted establishing the qualifying relationship. The director's decision on this issue will be withdrawn.

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 on the issue of the beneficiary's managerial or executive capacity.

ORDER: The appeal is dismissed.