U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 029 52905 Office: CALIFORNIA SERVICE CENTER Date: OCT 1 4 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California limited liability company that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) the petitioner does not have the ability to pay the proffered wage; and (2) the proffered position in the United States is not in an executive or managerial capacity.

On appeal, counsel submits a brief.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is the parent company of C&C Diffusion, located in France; (2) engages in contract administration and negotiation; and (3) employs five persons, including the beneficiary who is currently occupying the proffered position as an intracompany transferee (L-1A). The petitioner is seeking to employ the beneficiary permanently at a salary of $50,000 per year.

The first issue to be discussed in this proceeding is whether the petitioner has the ability to pay the beneficiary's salary of $50,000 per year. The AAO notes that, when filing the petition, the petitioner indicated on the Form I-140 and in an accompanying job offer that it was offering to pay the beneficiary a salary of $150,000 per year. However, in response to the director's request for evidence (RFE), counsel

indicated that a typographical error had occurred on the Form I-140 and in the job offer, and that the offered salary was $50,000, not $150,000.

In the denial letter, the director referred to the offered salary as $150,000, and stated that the petitioner did not have the ability to pay this wage. However, the director should have assessed the petitioner's ability to pay a salary of $50,000, not $150,000.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner submitted the beneficiary's W-2 form for 2001, which showed that it paid the beneficiary a salary of $52,000. As the priority date of the petition is November 1, 2002, the 2001 W-2 form is *prima facie* proof of the petitioner's ability to pay the proffered wage. Accordingly, the director's comments on this issue shall be withdrawn. The petitioner has sustained its burden of proving that it has the ability to pay the proffered wage of $50,000.

The second issue to be discussed in this proceeding is whether the beneficiary's proposed employment with the U.S. entity is in a 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) 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.

When filing the I-140 petition, the petitioner submitted a job offer, which stated that the beneficiary had been employed by its organization since August 2001. The letter stipulated the beneficiary's salary and stated that the offered position was for an indefinite period. The filing of the I-140 petition also included a letter from counsel. In this letter, counsel stated the beneficiary's job duties and described the petitioner's organizational structure.

The director was not satisfied with the initial evidence presented. Therefore, in a July 16, 2002 request for evidence (RFE), the director asked the petitioner to submit evidence relating to the beneficiary's proposed duties, including a more detailed description of his actual job responsibilities. The director also asked the petitioner to submit an organizational chart.

In response, counsel provided a letter in which she described the beneficiary's job duties and the percentage of time that the beneficiary spent on each duty. The petitioner submitted an organizational chart that showed the beneficiary, as president, and four employees under his supervision: financial manager; administrative assistant; market analyst; and contract administrator.

The director denied the position because the proffered position is not in a managerial or executive capacity. The director noted that the majority of the petitioner's employees worked part-time, and that this organizational structure could not support a primarily managerial or executive position.

On appeal, counsel states that 80 percent of the beneficiary's duties involve establishing goals and policies and 13 percent of the duties require him to make discretionary decisions. Counsel states further that the beneficiary also works in a managerial capacity because he supervises professional employees.

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. The regulation at 8 C.F.R. § 204.5(j)(5) states clearly, "[T]he 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 a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien."

In the present matter, the petitioner has never described the beneficiary's proposed duties. Instead, counsel has furnished the beneficiary's job descriptions, which detail the job responsibilities of proffered position. However, the statements of counsel on appeal 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). Counsel's statements regarding the beneficiary's duties are not a suitable alternative to a detailed job offer from the petitioner. The regulations mandate that the petitioner, not counsel, provide the job offer, and that such a job offer must describe in detail the duties that the beneficiary will be required to perform.

Nevertheless, even if the AAO accepted counsel's statements regarding the beneficiary's duties, her statements would fail to establish that the proffered position is either primarily managerial or executive.

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* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, 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 petitioner states that it is involved in contract negotiation/administration. Specially, counsel states that the petitioner is the contract administrator and negotiator for the organization, Duty Free Shops, on behalf of several French and Italian luxury brand companies. In counsel's response to the director's RFE, she stated that the beneficiary spends 50 percent of his time, in part, developing and overseeing "operating divisions, including accounting, administration, finance and marketing, and retains the services of business and tax attorneys and outside sales." However, counsel's use of the phrase "operating division" exaggerates the petitioner's organizational structure. The divisions to which counsel refers are really individuals, all of whom work part-time except for the administrative assistant. There is no evidence that the petitioner has the organizational complexity that counsel depicts. Furthermore, the petitioner has not presented any documentary evidence that it contracts with outside service providers as counsel states. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel states that the proffered position could be considered managerial because each position that the beneficiary supervises requires a baccalaureate degree and is, therefore, a professional position. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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 a 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, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the work of the administrative assistant, who is among the beneficiary's subordinates.

Counsel asserts that the proffered position could be considered executive because, in addition to establishing policies, the beneficiary spends 30 percent of his time, in part, travelling extensively to meet with current and new business clients, negotiating contracts, and attending trade shows. It is apparent from counsel's description of the beneficiary's job duties that the beneficiary primarily performs the tasks necessary for the petitioner to provide its services in contract administration and negotiation. The beneficiary does not primarily manage the negotiation and administration of the contract; he actually negotiates the contracts. 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). Accordingly, the position offered to the beneficiary is not in an executive or managerial capacity, and director's decision to deny the petition on this basis shall not be disturbed.

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.