



U.S. Citizenship
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FILE: SRC 02 244 51673 Office: TEXAS SERVICE CENTER Date: JUN 16 2005

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

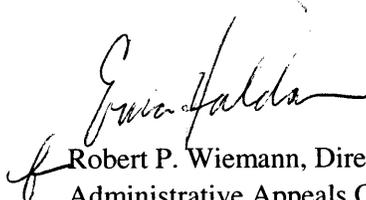
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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, Texas Service Center, denied the employment-based petition due to abandonment by the petitioner. On January 6, 2004, the petitioner filed a motion to reopen. The director granted the motion, and again denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant 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 supplier of fire control, detection and prevention equipment. It filed this immigrant petition requesting employment of the beneficiary as its operations manager.

On December 16, 2003, the director denied the petition based on the petitioner's abandonment of the petition, as the petitioner failed to respond to the director's request for evidence. Counsel for the petitioner subsequently filed a motion to reopen claiming that the petitioner responded in a timely manner to the director's request, and provided documentation of the petitioner's two attempts to submit the requested evidence. The director granted the motion, yet denied the petition concluding that the petitioner had not established that: (1) the petitioning entity was doing business for at least one year in the United States at the time of filing the petition; and (2) the beneficiary has been and would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel claims that when determining the employment capacity of the beneficiary, Citizenship and Immigration Services (CIS) considered only managerial capacity and failed to take into account the separate requirements for executive capacity. Counsel contends that the beneficiary is employed by the United States entity in an executive capacity. Counsel also challenges the director's reliance on the petitioner's lack of personnel in determining that the beneficiary is not employed in a qualifying capacity. 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 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.

The AAO will first address the issue of whether the petitioning entity was doing business in the United States for at least one year at the time the petition was filed.

The petitioner does not submit specific evidence on appeal challenging the director's finding that it was not doing business in the United States for at least one year at the time the instant petition was filed. Counsel merely states in his brief on appeal:

Petitioner has shown sincere business activity in the United States as evidenced by the submission of tax returns and by the fact that it does have at minimum one (in current actuality two) additional employee(s).

Counsel's limited statement with regard to the petitioner's business operations is not sufficient to overcome the director's finding. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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 director specifically asked in her August 6, 2003 request for evidence that the petitioner submit copies of invoices, bills of sale and product brochures dated from August 2001 as evidence of the company doing business. 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 director's finding with regard to this issue is affirmed. Accordingly, the appeal will be dismissed.

The AAO will next address 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 filed the nonimmigrant petition on August 9, 2002, noting that the beneficiary would be employed as the operations manager for the United States entity. The petitioner further noted on the petition that it presently employed nine workers. In an undated letter submitted with the petition, the petitioner offered the following explanation regarding the beneficiary's employment:

The need to retain [the beneficiary's] services has arisen because of the ambitious expansion plans that are currently being undertaken, including the continued development of our company. [The beneficiary] has autonomous control over, and exercises wide latitude and discretionary decision-making in relation to both our United States and Colombian companies. He is amply qualified for the position because of his experiences with our Colombian subsidiary as well as his tenure with [the petitioning organization].

The director issued a request for evidence, dated August 6, 2003, asking that the petitioner provide documentary evidence pertaining to the beneficiary's employment in the United States as a manager or an executive. Specifically, the director requested that the petitioner submit a statement describing the beneficiary's position, including: (1) the job duties performed by the beneficiary; (2) the percentage of time devoted to each task; (3) the subordinate employees who would report directly to the beneficiary; and (4) a description of each employee's job title, job duties, and educational level. The director noted that if the beneficiary does not supervise any employees, the petitioner should explain the essential function managed by the beneficiary. The petitioner failed to respond to the director's request. As a result, the director denied the petition due to abandonment in a decision dated December 16, 2003.

Counsel for the petitioner subsequently filed a motion to reopen submitting evidence of the petitioner's two attempts to respond to the director's request for evidence and the documentary evidence previously requested by the director. Counsel provided the following list of the beneficiary's "managerial/executive" job duties,

which counsel explained were performed by the beneficiary in his capacity as general manager of both the United States and foreign entities, and noted the accompanying time devoted to each on a weekly basis:

1. Attend, assist & coordinate weekly staff meetings. 3.0 hours
2. Prepare and review corporate, financial, and operations reports. 4.0 hours
3. Develop long and short-term business plans in keeping with projected, growth corporate goals. 5.0 hours
4. Review and approve all matters involving personnel payroll, and employee benefits. 8.0 hours
5. Prepare marketing and pricing strategies to market service contracts and sale of products. 2.0 hours
6. Prepare and submit all sales and import tax returns to Colombian government for customs merchandise. 3.0 hours
7. Create, coordinate, and supervise the production of promotional literature for clients & exhibitions both in Colombia & internationally. 3.0 hours
8. Negotiate large purchase orders with new and established clients to obtain the best terms. 4.0 hours
9. Coordinate, authorize, and supervise all shipment products both national and international. 3.5 hours
10. Attend monthly Chamber of Commerce business meeting for businesses. 3.5 hours
11. Review and authorize all corporate expenditures submitted by bookkeeper/accountant. 4.0 hours
12. Review and authorize international sales orders. 2.0 hours
13. Review accounts receivables and inventory shipments. 3.0 hours
14. Direct & manage all aspects of company's marketing & product development activities. 5.0 hours
15. Review weekly corporate expense reports and bank reconciliation statements. 2.0 hours
16. Prepare bank deposits and deposit funds and checks into bank. 1.0 hours.

Counsel submitted the petitioner's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for the year 2001, and the petitioner's federal and state quarterly tax returns for the quarters ending September

and December 2001, all quarters of 2002, and March 2003. Counsel also provided a list of seven workers employed in the following positions: general manager, two assistant managers, a secretary, a part-time secretary, and two messenger/drivers.

On February 27, 2004, the director determined that the petitioner had failed to demonstrate that the beneficiary had been and would be employed by the United States entity in a primarily managerial or executive capacity. The director identified discrepancies in the evidence submitted by the petitioner, specifically noting that several employees listed by the petitioner were employed in 2001 only. The director also noted that the record lacked evidence that two other named workers were ever employed by the petitioning entity, and stated that the quarterly tax return for the third quarter in 2002, the period during which the petitioner as filed, identified only three workers as opposed to the nine workers claimed by the petitioner to be employed in the organization.

The director further stated that the record indicates that the beneficiary is performing many of the daily operations of the business, such as the marketing and accounting functions. The director noted that the petitioner has an insufficient staff to relieve the beneficiary from performing the day-to-day business operations, and stated "[b]ased on the number of employees, it is questionable whether the beneficiary spends a majority of his time performing purely managerial or executive duties." The director determined that the petitioner had not demonstrated that the beneficiary has been or would be primarily directing or supervising a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing the non-qualifying functions of the business. Consequently, the director denied the petition.

Counsel filed an appeal on March 29, 2004. In his brief on appeal, counsel states that CIS failed to acknowledge that the regulations allow for employment in either a managerial or executive capacity, and contends that CIS considered only the beneficiary's employment in a managerial capacity. Counsel claims that instead the beneficiary is employed in an executive capacity as he: (1) is president and the "primary employee" of the petitioning organization and is "100% responsible for the executive management of the entire business"; (2) will establish the business' goals and policies and have complete discretion in deciding the petitioner's development; (3) will negotiate and perform all executive tasks; and (4) "will not answer to any higher-level executives in more than a general way."

Counsel challenges the director's reference to the petitioner's personnel and states "[t]he absence of multiple employees, however, does not signify that the executive criteria are not met." Counsel notes that the requirements for employment in an executive capacity do not address "employee supervision," and refers to an unpublished AAO decision as evidence that "a sole employee can claim executive capacity because independent contractors can be used instead of employees." Counsel further notes that if the petitioner's staffing levels are taken into account, the statute requires CIS to consider the reasonable needs of the organization. Counsel states:

Petitioner asserts that the lack of employees should not be dispositive in this case because Beneficiary is the primary employee who is an executive, and the nature of development of the business is such that multiple employees are not warranted. Petitioner's U.S. Company has submitted previous years tax returns and W-2's indicating a high level of operations (see gross income levels). Petitioner considers that it would be imprudent to hire workers before the chief executive calls for their need. Petitioner has not hired additional employees in light of the use of independent contractors. However [CIS] claims this insufficient for failure to

demonstrate payments. Yet such documentation is clearly evinced on existing returns numerical values alone. . . high levels of income require productivity and it is important to note that such individuals (subcontractors) may be paid in check which need not be submitted to any governing body other than the IRS yet such documentation need not be prepared until such time as the corporations [sic] accountant requires same for tax purposes...current years returns not yet come due or prepared; however, you currently hold a few past years W-2's previously submitted for your convenience.

Counsel also contends that CIS should take into account the beneficiary's position of chief executive officer in the overseas company, and the fact that the "U.S. business is no longer in a startup phase." Counsel states that the size of the United States business "is sufficient to warrant the need for an executive," and claims that the beneficiary would "continue to handle duties that are executive in nature in overseeing operations."

Upon review, the petitioner has not demonstrated that the beneficiary would be employed by the petitioning entity 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). While the petitioner submitted a detailed list of the job duties to be performed by the beneficiary, the outlined tasks do not substantiate counsel's claim on appeal that the beneficiary would be employed in a primarily executive capacity.

Counsel claims on appeal that the daily activities of the business would "remain the responsibility of the additional employees," therefore allowing the beneficiary to be "100% responsible for the executive management of the entire business." Counsel however does not specifically identify either the amount of workers employed by the petitioner or the job duties of the "additional employees." Nor does counsel explain how the AAO can consider the beneficiary to be performing primarily executive tasks with an undefined subordinate workforce. Although the record contains the petitioner's quarterly tax return for the quarter during which the petition was filed and a list of the petitioner's employees, neither coincides with the petitioner's initial claim on the immigrant petition that it employs nine workers. The petitioner's quarterly tax return for the quarter ending September 2002, which is the period during which the petition was filed, identifies three workers – the beneficiary, an assistant manager, and a worker whose position is not specified. Alternatively, the petitioner's list of employees also submitted with the quarterly tax return identifies seven workers, of which only two, the beneficiary and the assistant manager, also appear on the quarterly tax returns. As correctly noted by the director, the remaining five employees seem to have been employed prior to the filing of the petition. If the workers were not employed prior to the filing of the petition, their current employment has not been confirmed.

Clearly, the record contains numerous inconsistencies in the petitioner's personnel structure that undermine counsel's claim that "additional employees" would be responsible for the performance of the business' day-to-day activities. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Also, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Additionally, the record fails to support counsel's claim on appeal that the beneficiary, similar to the employee in an unpublished AAO decision "can claim executive capacity because independent contractors can be used instead of employees." While the AAO acknowledges that, under certain circumstances, the sole employee of an organization may be deemed to be employed in a managerial or executive capacity, counsel has not furnished any evidence to establish that the facts of the instant petition are analogous to those in an unpublished matter. Counsel acknowledges that the petitioner is obligated to report to the Internal Revenue Service any payments made to subcontractors. However, the record does not contain any documentary evidence, such as the petitioner's corporate tax returns identifying payments made for "cost of labor," issued Internal Revenue Service (IRS) Forms 1099-MISC, Miscellaneous Income, or contractual agreements, that independent contractors are utilized by the petitioner, thereby allowing the beneficiary to perform in a primarily executive capacity. Despite counsel's claim on appeal, the "high levels of income" reported on the petitioner's income tax return are not conclusive of the petitioner's use of independent contractors. It is unrealistic to expect the AAO to assume the beneficiary's supervision of an outside workforce based solely on the petitioner's economic growth. 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)). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Moreover, the majority of the above-outlined job duties for the beneficiary are non-qualifying functions of the business, rather than high-level managerial or executive responsibilities. 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). Here, the beneficiary would clearly be responsible for many of the business' non-managerial and non-executive operations, such as preparing financial and operations reports and marketing and pricing strategies, negotiating orders with clients, reviewing, coordinating and supervising shipments, reviewing sales orders, accounts receivables, sales reports and bank reconciliation statements, and making bank deposits. Based on the petitioner's outline of the beneficiary's responsibilities, the beneficiary would spend, at most, approximately eighteen hours in his fifty-eight hour workweek performing managerial or executive tasks. As a result, the beneficiary would not be employed in a primarily qualifying capacity, but rather, would be performing the day-to-day functions of the business. 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).

Furthermore, following a review of the entire record, it appears that counsel is attempting on appeal to conform to CIS regulations by claiming the beneficiary is employed as an executive rather than a manager. Counsel contends that the beneficiary qualifies as an executive rather than a manager because the regulatory criteria of executive capacity, unlike managerial capacity, do not require that the beneficiary supervise the work of other supervisory, professional or managerial employees. Counsel states that instead, as an executive, the beneficiary is "responsible for the executive management of the entire business." However, as discussed previously, counsel also claims that the petitioner employs "additional employees," who, assumedly, would be managed by the beneficiary as their "operations manager." It therefore appears that following the director's denial of the initial claim of "managerial" employment, counsel attempted on appeal

to conform the beneficiary's job duties to the regulatory definition of executive capacity. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary has been or would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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 and the petition will be denied.

ORDER: The appeal is dismissed.