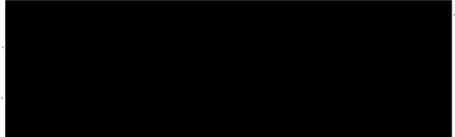




U.S. Department of Justice
Immigration and Naturalization Service

B4

OFFICE OF ADMINISTRATIVE APPEALS
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ULLB, 3rd Floor
Washington, D.C. 20536



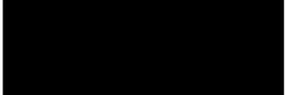
PUBLIC COPY

File: WAC 99 025 50219

Office: CALIFORNIA SERVICE CENTER

Date: JAN 30 2001

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)

IN BEHALF OF PETITIONER:



identification data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California corporation that claims to engage in the import and distribution of test and measurement instruments. The petitioner seeks to employ the beneficiary as its general manager and, therefore, endeavors 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 director of the California Service Center denied the petition because the petitioner failed to establish that the beneficiary will be employed in an executive or managerial capacity for the U.S. entity. It is noted that the beneficiary is currently employed by the petitioner in L-1A nonimmigrant status as its marketing manager, a position different from the one for which the petitioner is seeking an immigrant visa in behalf of the beneficiary.

On appeal, counsel submits a brief. The petitioner submits a current company brochure, copies of its 1998 and 1999 federal corporate income tax returns, an updated organizational chart, and copies of recent invoices.

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.

8 C.F.R. 204.5(j)(2) states, in pertinent part:

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) 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;
- (C) 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
- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

The director found that the beneficiary's proposed duties as general manager would not be primarily executive or managerial for two reasons; (1) the beneficiary would supervise two non-professional employees, a sales assistant and a technician; (2) the job description for the beneficiary was extremely vague, as it did not contain any information about the beneficiary's proposed day-to-day activities, or provide any insight into how the company functions; and (3) the size of the company could not support two primarily managerial or executive positions, which are the positions of president and general manager (the proposed position of the beneficiary).

Counsel's primary argument on appeal rests on changes in the petitioner's structure that have occurred since the filing of the initial I-140 petition on November 2, 1998. According to counsel, the evidence shows that the beneficiary now supervises four

employees instead of two employees. Additionally, counsel claims that the petitioner is now comprised of seven employees instead of four employees. Furthermore, counsel stresses that the director misconstrued facts when she claimed that the beneficiary would be sharing managerial duties with the company's president. According to counsel, when the beneficiary's I-140 petition is approved, the president will return to the foreign entity, which will leave the beneficiary the sole individual in charge of the petitioner.

Counsel's arguments are not persuasive.

In discussing the changes in the petitioner's corporate structure that occurred after the filing of the I-140 petition, counsel states on appeal that "it is surprising that the Service simply did not request updated information when it was finally ready to review the petition." Counsel, however, fails to note the regulation at 8 C.F.R. 103.2(b)(12), which requires a petitioner to establish eligibility for the benefit sought at the time a petition is filed.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

Therefore, a finding of whether the beneficiary is entitled to visa classification as an executive or manager must be based solely on the organizational structure of the petitioner at the time it filed the petition, and not on any changes in the organizational structure or staffing levels that the petitioner has made, or endeavors to make, subsequent to the petition filing.

The new set of facts concerning the petitioner's increase in staff from four individuals to seven individuals will not be considered on appeal, as these represent changes in the petitioner subsequent to the filing of the petition. As noted by the director in her denial, the petitioner failed to specify what the exact organizational hierarchy of the petitioner would be if the beneficiary were to assume the role of general manager. Additionally, the petitioner failed to describe the job duties of the employees within the organization to enable the director to determine whether the positions were managerial, supervisory or professional, and whether the petitioner employed a sufficient staff to relieve the beneficiary from performing nonqualifying duties. Without this information, the Service cannot conclude that the beneficiary would occupy a primarily executive or managerial position, despite his title as general manager.

Another issue that the director raised in her denial was the vague job description for the beneficiary. In the initial I-140 petition, the petitioner described the beneficiary's duties as follows:

To direct and coordinate activities of US branch office to obtain optimum efficiency and economy of operations and maximize profits: plan and develop organization policies and goals, and implement goals through subordinate administrative personnel. To coordinate activities of research and development to effect operation efficiency and economy. To direct and coordinate promotion of products and services performed to develop new markets, analyze/allocate budget. Confer with personnel.

The petitioner indicated on the Form ETA 750 that the beneficiary would supervise three employees; however, there is no information about the titles or job duties of the three alleged subordinate employees.

The director correctly found the above job description to be vague and lacking any insight into the beneficiary's daily functions. By using broad statements to describe the beneficiary's duties, the petitioner did not submit a job offer in the form of a statement, which clearly describes the duties to be performed by the alien. It is the Service's position that the petitioner failed to clearly describe the beneficiary's proposed job duties. Counsel does not present any argument on this issue on appeal, so the director's objections to the vague and generalized job description has not been overcome.

The final issue to be addressed is the director's finding that the petitioner's organizational structure could not support two executive or managerial positions. Counsel claims on appeal that the director misunderstood that upon approval of the I-140 petition, the petitioner's president would return to work for the foreign entity, and the beneficiary would take complete control over the company's operations.

The Service is not persuaded to find that the beneficiary's primary duties will be executive or managerial in nature simply because the company president will not work on the petitioner's premises. Contrary to counsel's argument, the absence of the president does not necessarily lead to the conclusion that the beneficiary will devote the primary amount of his time to executive or managerial duties. As previously stated, the lack of a clear job description is a determinative factor. If the petitioner is unable to provide a job description that allows the Service to understand the daily activities of the beneficiary, then regardless of whether the company president works on the petitioner's premises, the petition cannot be approved.

Neither counsel nor the petitioner has presented persuasive evidence on appeal to overcome the director's objections. Therefore, the director's denial is affirmed.

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 sustained that burden.

ORDER: The appeal is dismissed.