

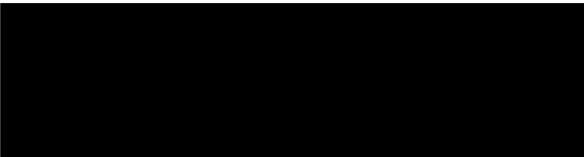


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U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 01 223 51270

Office: VERMONT SERVICE CENTER

Date:

FEB 11 2003

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. 1418(b)(1)(C)

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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.

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 that 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Virginia organization incorporated in February of 1998. It imports and sells oriental carpets. It seeks to employ the beneficiary as its multinational president and director. Accordingly, the petitioner seeks 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 primarily managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner asserts that the beneficiary is employed and will continue to be employed in a managerial and executive capacity in terms of the beneficiary's executive duties and senior level supervision over professional employees. Counsel also submits additional documentation for review.

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.

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.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States petitioner.

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.

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 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. Rather, 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 initially stated that the beneficiary "establishes the financial policies and marketing strategy of the company, and delegates power to execute the policies as well as administrative control to the [vice-president] of our company." The petitioner also stated that the beneficiary "exercises ultimate authority in regard to the hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions, and remuneration," and "conducts regular performance reviews and ensures that the staff follows corporate procedures." The petitioner further stated that the beneficiary "is responsible for budgeting, managing and directing all development activities of [the petitioner]," and "is responsible for the promotion of standardization across our international offices."

The director requested further information on the beneficiary's job duties for the petitioner and a breakdown of the number of hours spent on each of the duties.

In response, counsel for the petitioner stated that the beneficiary spent approximately ten hours per week on the promotion of standardization across international offices, including communicating with the managers at the parent company and other international offices. Counsel also stated that the beneficiary spent approximately five hours presiding over meetings with managers and representatives from the international units to ensure compliance and standardization of corporate philosophy throughout the international network. Counsel stated further that the beneficiary spent five to ten hours per week conducting staff meetings and making written policy recommendations. Counsel indicated further that the beneficiary spent two to five hours per week submitting budget and financing requests to the parent company. Counsel also indicated that the beneficiary spent five to ten hours per week conducting regular performance reviews and the rest of her workweek on administrative and other miscellaneous matters.

The director determined that based on the petitioner's description of the beneficiary's duties, it appeared the beneficiary would be

performing all the day-to-day functions of the business. The director concluded that the petitioner had not established that the beneficiary would be employed in either a managerial or executive position.

On appeal, counsel for the petitioner asserts that the administrative day-to-day duties are performed by employees subordinate to the beneficiary and by independent contractors. Counsel also asserts that the beneficiary supervises four professional employees who have bachelor or higher degrees. Counsel submits payroll records for an administrative employee that were issued in the last quarter of 2001 and the first quarter of 2002, a letter from a temporary employment agency with invoices dated in 1998, a Virginia State Unemployment Report depicting one employee in December of 1998, and an agreement with an unrelated company to sell the petitioner's product on a commission basis. Counsel asserts that the beneficiary will be employed in a managerial or executive capacity for the petitioner.

Counsel's assertions are not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). We cannot completely agree with the director that the petitioner's description of the beneficiary's job duties indicate that the beneficiary will be performing all the day-to-day activities of the company. However, the job description is so vague and general in nature that we cannot determine exactly what the beneficiary will be doing on a daily basis. It is not clear from the position description what the beneficiary's promotion of standardization and communicating and meeting with international managers has to do with the importing and selling of oriental carpets in the United States. It is not clear why the beneficiary spends five to ten hours per week conducting performance reviews of other employees when the petitioner has presented evidence of only three other direct employees. Counsel for the petitioner states that the beneficiary spends five to ten hours per week conducting staff meetings and making written policy recommendations but has produced no documentary evidence of the written policies. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Perhaps, the director was focussing on the petitioner's original description of the beneficiary's duties in which the petitioner indicated that the beneficiary was responsible for establishing financial policies and marketing strategy as well as exercising ultimate authority in hiring, firing, training, and delegation of assignments. We agree that it is not clear from these statements whether the beneficiary will be providing primarily executive or

managerial duties with respect to these tasks or will actually be performing the duties. An employee, however, 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 description of the beneficiary's duties for the petitioner is not comprehensive and does not convey an understanding of what the beneficiary's actual responsibilities will entail. The position description does not sufficiently detail the beneficiary's duties and the remaining record does not support a conclusion that the beneficiary is employed in a managerial or executive capacity. Counsel submits on appeal payroll records for one employee. However, the payroll records are for payments that began in October of 2001, several months after the petition was filed. The employment of this individual is not reflected in the position descriptions provided by counsel in response to the director's request for evidence. It is not possible to determine that this individual was employed at the time the petition was filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The employment of this individual after the petition was filed does not contribute to a finding that the beneficiary was and will be performing executive or managerial duties.

On appeal, counsel also submits a letter and invoices from a temporary employment agency. However, the use of this agency apparently occurred when the petitioner was first established. The record does not contain documentation that the petitioner was using this agency and its employment services at the time the petition was filed. Counsel's submission of independent evidence that the petitioner employed a person in 1998 also does not assist in the determination that the petitioner continued to employ personnel for the beneficiary to supervise at the time the petition was filed. The petitioner's agreement with a third party to work on a commission basis is not supported by evidence that the company ever performed work for the petitioner. The record contains no evidence that the third party was ever paid a commission. The record contains no independent information that the petitioner employed individuals other than the beneficiary at the time the petition was filed. In sum, the above evidence fails to demonstrate the beneficiary functions in a managerial or executive capacity.

Even if the petitioner had provided documentary evidence of the employment of other personnel at the time the petition was filed, the descriptions of duties for the positions subordinate to the beneficiary do not describe professional positions. Although the person employed may have a bachelor degree or higher, it is the duties of the position itself that are dispositive, not the

education level of the employee.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The descriptions of the beneficiary's job duties fail to adequately describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been or will be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed affiliated company. The petitioner asserts that it is a subsidiary of a Chinese company. The petitioner indicates that its claimed parent company formed a joint venture with another company to initially capitalize the petitioner. However, the petitioner does not provide evidence of the issuance of stock certificates or documents evidencing the capital investment. Other than the assertions of the petitioner, the record contains no evidence that a qualifying relationship exists.

In addition, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$30,000 per year.

8 C.F.R § 204.5(g) (2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has not provided federal tax returns or audited financial statements to support a claim that it is a viable company that can pay the proffered wage. The petitioner has not

demonstrated that it has sufficient net income to pay the beneficiary the proffered wage.

Further, the petitioner has not provided sufficient information to establish that the beneficiary was employed by the claimed foreign entity in a managerial or executive position for one year prior to entering the United States as a non-immigrant.

As the appeal will be dismissed for the reason stated above, these issues will not be examined further.

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.

ORDER: The appeal is dismissed.