U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

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

[redacted]

File: WAC 99 200 51671 Office: CALIFORNIA SERVICE CENTER Date: FEB 25 2003

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)

IN BEHALF OF PETITIONER:

[redacted]

identifying 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 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of California that is engaged in the business of computer software development with expertise in geographical information systems. It seeks to employ the beneficiary as its project manager. Accordingly, it 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 managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the petitioner has provided very specific job duties for the beneficiary and that more than 50 percent of the job duties are managerial and executive in nature.

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 primarily managerial or executive capacity for the United States entity.

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-
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> 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;
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> 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
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> 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-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction

> from higher level executives, the board of directors, or stockholders of the organization.

The petitioner stated the beneficiary's job duties for the petitioner as follows:

> [H]e will direct and control all activities dealing with the design and development of customized GIS applications for our existing municipal clients and our future clients, applying knowledge of GIS applications and expertise in object-oriented software development. He will supervise the production of software products as appropriate at our India office. He will also assist me [the petitioner's president] and other senior personnel in identification and development of new business opportunities both here and abroad. His specific responsibilities will include:
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> 1.Lead and direct GIS consulting services to clients.
> 2.Develop custom GIS applications using proprietary programming languages.
> 3.Gather user requirements and perform system and application design.
> 4.Perform data modeling design and review to clients.
> 5.Lead and direct the development of GIS or related applications dictated by specific project requirements.
> 6.Design and develop interfaces to external systems such as database management systems.
> 7.Mentor and advise less experienced consultants and client staff on the intricacies of GIS and related applications.
> 8.Assist in business development in the U.S. and abroad.

The director requested the petitioner's organizational chart and wage reports.

In response, the petitioner provided its organizational chart depicting a president, five project managers, a chief financial officer, and three technicians. The beneficiary's position on the chart was depicted not only as one of the five project managers but also as a software developer. The chart did not reflect any employees reporting to the beneficiary. The petitioner also included Internal Revenue Service (IRS) W-2 Forms, Wage and Tax Statements for seventeen employees for the year 1999.

The director determined that the petitioner had not provided evidence that the beneficiary had a subordinate staff to perform the services of the corporation. The director also determined that the beneficiary's duties had been described only in broad and general terms. The director concluded that the record was insufficient to establish that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner submits a new organizational chart for the petitioner and states that the previous chart submitted did not accurately reflect the beneficiary's supervisory duties. Counsel also submits a chart outlining the various projects that the beneficiary had been involved in and his duties relating to the projects. Counsel asserts that the initial description of the beneficiary's job duties was specific and clearly shows that the beneficiary's duties are managerial and executive in nature. Counsel also notes that the beneficiary has previously been granted L-1 status and that the petitioner wants the beneficiary to continue performing the same services for the petitioner as pursuant to the L-1 classification.

It appears that the petitioner is claiming that the beneficiary is engaged in managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section 101(a)(44)(B) of the Act. However, the petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Counsel's assertion that the description of the beneficiary's job duties clearly establishes the duties as managerial and executive in nature is not persuasive. 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). The petitioner has submitted a broad position description that refers to duties that are more indicative of an individual providing basic operational services for the company. 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 stated that the beneficiary would "[d]evelop custom GIS applications," and "[g]ather user requirements and perform system and application design," and "[p]erform data modeling design and review to clients," and "[d]esign and develop interfaces." Although this is a fairly comprehensive description of the beneficiary's duties, the duties are for a position of a software developer and design consultant. Likewise, the beneficiary's duty of mentoring and advising less experienced consultants indicates that the position is merely for a more experienced consultant. Counsel's submission of a chart outlining the various projects that the beneficiary had been involved in also provides a description of duties that shows that the beneficiary is performing the tasks necessary to provide services to the petitioner and is not managing the performance of these services through the work of others.

Counsel's submission of a revised organizational chart is not

persuasive. The record does not reveal when the two additional employees now under the beneficiary's supervision were hired. We note that neither of these individuals was employed in 1999 as the record does not reveal that the petitioner issued W-2 Forms to them. 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). Moreover, the petitioner's initial job description for the beneficiary's position did not reveal that a majority of the beneficiary's time was spent supervising other individuals.

Counsel's reliance on the previously granted L-1 classification to the beneficiary is injudicious. The director's decision does not indicate whether she reviewed the prior approvals of the other non-immigrant petitions. The record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. If the previous non-immigrant petitions were approved based on the same information that is contained in the current record, the approval would constitute clear and gross error on the part of the Service. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied* 485 U.S. 1008 (1988).

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 in nature. The descriptions of the beneficiary's job duties are general in nature and are more indicative of an individual providing services to the enterprise rather than managing the enterprise. The record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him 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 employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not provided adequate documentation that it has a qualifying relationship with the Indian company. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company. The petitioner was incorporated in California in 1992. The

petitioner's IRS 1120 Forms, U.S. Corporation Income Tax Returns indicate that the president of the petitioner owns 71 percent of the petitioner. The president of the petitioner initially also owned 71 percent of the foreign entity. In January of 1998 the petitioner apparently bought a greater than 50 percent interest in the foreign entity. The record does not contain information regarding how this transfer was made and the funds that were used to purchase a portion of the foreign entity. It is not clear that the petitioner and the foreign entity are affiliated as defined in 8 C.F.R. § 204.5(j)(2). Ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in non-immigrant proceedings); see also *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). The record is deficient in this regard.

As the petition will be dismissed for the reason stated above, this issue is not examined further.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.