



U.S. Department of Justice
Immigration and Naturalization Service

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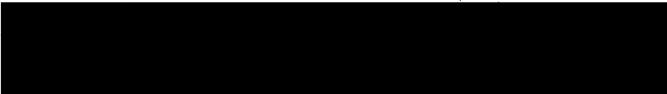
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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 00 138 52667 Office: CALIFORNIA SERVICE CENTER Date: FEB 27 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. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:



PUBLIC COPY

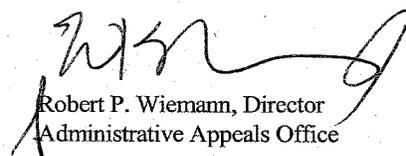
INSTRUCTIONS:

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.


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 corporation organized in the State of California in 1994. It is engaged in the business of exporting wood to China and importing wood products to the United States and Canada. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, the petitioner endeavors 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 executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Service decision was in error.

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 and 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 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. 8 C.F.R. 204.5(j) (5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the 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.

The petitioner initially submitted a description of the beneficiary's duties as follows:

He chairs the company's Board of Directors [sic] meetings and sets corporate goals and policies. He develops long and short term business plans as well as directs the business activities of all four subordinates in the company: a Vice President, a Purchasing Director, an Administrative and Financial Assistant and a Secretary. He directs the formulation of financial plans and annual budget reports for the Board and the parent company's review. He exercises personnel management authority over the hiring, promotion and discharging of employees. He has been devoting a majority of his time in executive duties.

The petitioner through its counsel submitted an additional description of the beneficiary's duties in response to the director's request for additional information as follows:

After [the beneficiary] reports to the U.S. company as President and Chief Executive Officer, he will be in charge of the overall management and operation of the company. He will review the corporate goals and policies of the company based on the performance and financial condition of [the overseas entity] and the U.S. company in the past few years. He will then make necessary adjustments and changes accordingly. [The beneficiary] will constantly monitor and coordinate the business development of these two companies based on market conditions and customer demands. He will direct the purchasing and exporting activities of the company, and review and approve the purchasing plans prepared by the Vice President and the purchasing director. [The beneficiary] will also be in charge of formulating the expansion strategies and financial plans of the company. He will review the company's financial reports, review reports on new products and supplier contacts, make decisions on developing new line of products, and approve business plans and contracts in the course of business. [The beneficiary] will have wide latitude in decision-making and in the hiring and firing of senior staff.

The director determined that the petitioner's business is

international trade and concluded that the international trading industry does not require professional employees. The director reasoned thus that the petitioner's employees were not professional employees. The director also determined that the record did not show that the petitioner required or hired professional employees. The director further reasoned that given the petitioner's type of business, it was unreasonable to believe that the beneficiary would not be involved with the day-to-day non-supervisory duties that are commonplace within the industry. The director concluded that the beneficiary would be a first-line supervisor over the petitioner's four non-professional employees. The director ultimately found that based on the evidence submitted that the beneficiary had not been and would not be employed in a primarily executive or managerial capacity.

On appeal, counsel asserts that the Service's contention that the international trading industry does not require professional employees is a sweeping statement that is unfounded and arbitrary. Counsel also asserts that the Service's conclusion that the beneficiary is a first-line supervisor of non-professional employees is in error. Counsel further asserts that the petitioner employs four subordinate staff members that perform the day-to-day non-supervisory duties and that the beneficiary directs and manages these employees. Counsel also asserts that the Service erred when it did not take into consideration the staffing levels and reasonable needs of the petitioner. Counsel finally notes that the Service had on four previous occasions approved the beneficiary's classification as an L-1A nonimmigrant manager or executive.

It is noted that neither counsel nor the petitioner clarifies whether the beneficiary is claiming 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. It appears that the beneficiary may be claiming to be employed as both a manager and an executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. 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 the beneficiary is representing he or she is both an executive and a manager. We will address both definitions and the beneficiary's eligibility pursuant to each definition.

Counsel's first assertion regarding the Service's sweeping statement that the international trading industry does not require professional employees is persuasive. The director's statement is conclusory and is not particular to this specific case. The director also determines, however, that the record does not show that the petitioner requires or hires professional employees. It is not clear from the director's determination regarding the record whether he is basing his determination on the erroneous belief that the international trading industry does not require

professional employees per se or whether he is basing his determination on the position descriptions of the petitioner's employees contained in the record.

The petitioner provided job titles and general position descriptions for all of its employees. The petitioner's descriptions however, do not suggest that any of the petitioner's subordinate staff were engaged in positions that are professional positions. Because the regulations do not provide a definition for a "professional position" for a petition filed pursuant to section 203(b)(1)(C) of the Act, we will look at the definition of "profession" found in the Act itself. Section 101(a)(32) of the Act states that the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers. This provides some guidance on the type of position that the Service should be considering as a professional position. The petitioner employed at the time of filing the petition, the beneficiary, a vice-president, an administrative/financial assistant, an import/export clerk, a purchasing manager, a purchasing director, and a secretary.¹ At the time of the response to the director's second request for evidence on June 2, 2001, the petitioner only employed the beneficiary, a purchasing manager, an administrative/financial assistant, an import/export clerk, and a secretary. Counsel confirms on appeal, that the petitioner's four subordinate employees, with the possible exception of the purchasing manager are non-professional employees. The purchasing manager's job description indicates that this individual is "in charge of the purchasing activities of the company." The job description for the purchasing manager also indicates that "[the purchasing manager] develops plans for sourcing and purchasing, identifies suppliers, develops good suppliers and relationships, as well as negotiates and approves purchase contracts." Neither the petitioner nor counsel provides evidence that the position of "purchasing manager" should be considered a professional position. There is nothing contained in the brief description of the purchasing manager's duties that indicate the position should be included within the definition of a profession as defined by the Act. Although the director's sweeping statement that the international trading industry as a whole does not require professional employees is in error, the record of this particular case does not demonstrate that the beneficiary supervises professional employees. The record does not support a finding that the beneficiary supervises professional employees.

¹ The petitioner submitted an organizational chart and a California DE-6, Quarterly Wage Report that reflected it employed a vice-president, a purchasing director, and an import/export clerk at the time of filing. However, on appeal, the petitioner submits a denial of the vice-president's status as a manager or an executive and an employee list that shows that the petitioner no longer employs a vice-president or a purchasing director.

Counsel's assertion that the beneficiary is more than a first-line supervisor is not persuasive. Counsel's assertion is based on the disparate functions of the four subordinate employees. Counsel asserts that the nature of the disparate functions of the four subordinate employees necessarily requires an executive or a manager to direct and supervise them.

First, the supervisory aspect of the beneficiary's duties is applicable only to the managerial definition. The supervision of other employees comes into play when looking at the second element of the managerial definition. There is no directly comparable element found in the definition of executive capacity.

Second, in looking at the four essential elements that the beneficiary must meet to be considered a manager, the evidence must demonstrate that the beneficiary, manages the organization, supervises and controls the work of other supervisory, professional, or managerial employees, has the authority to hire and fire or recommend these and other personnel actions, and exercises discretion over the day-to-day operations over which the employee has authority. The managerial definition specifically excludes a first-line supervisor from being considered a "manager" under this definition unless the first-line supervisor supervises professional employees. In examining the 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's initial description of the beneficiary's job duties was vague and general in nature. The director requested additional information on this issue. It is not clear from counsel's response to the director's request whether the description of the beneficiary's duties pertains to the beneficiary performing executive duties or performing managerial duties for the petitioner. Counsel's provision of general information regarding the beneficiary's duties does not support a claim that the beneficiary is "managing the organization" as defined by the Act. More importantly, it is clear from the information provided by counsel on appeal, that the beneficiary is supervising four non-managerial, non-supervisory, and as determined above, non-professional employees. There is no clear consistent evidence that the purchasing manager, the administrative/financial assistant, the import/export clerk, or the secretary supervises or manages others. The job descriptions provided do not reveal that any of the four subordinate employees supervise or manage others. The organizational chart depicts several tiers of management however the vice-president and the purchasing director are no longer employed by the petitioner, deleting one tier of the management structure. Counsel, on appeal, states that the beneficiary should not be considered just a first-line supervisor because of the subordinate employee's disparate functions. Counsel does not address the criteria found in the second element of the managerial definition requiring that a beneficiary supervise and control other managerial or supervisory employees, other than to state that the four

subordinate employees handle the non-supervisory duties. Neither counsel nor the petitioner provides evidence that the petitioner's four subordinate employees are managers of other employees or of essential functions as required under the Act. Again the Service cannot conclude from the record that the beneficiary supervises managerial or supervisory employees.

The petitioner has not provided sufficient information to conclude that the beneficiary meets the first two criteria of the managerial definition. The definition of managerial capacity requires that the beneficiary meet all four criteria of the definition. Therefore it must be concluded that the beneficiary is not and will not be employed primarily in a managerial capacity under the Act.

Addressing the executive nature of the beneficiary's duties, we note that the petitioner initially stated that the beneficiary would devote a majority of his time to executive duties. However, there is no clear delineation of the time the beneficiary will spend on executive duties and the time the beneficiary will spend as a first-line supervisor.

The petitioner's description of the beneficiary's executive duties indicates that the beneficiary is responsible for the overall management and operation of the company and for setting, reviewing and making changes to corporate goals and policies. However, these statements merely paraphrase elements of the definition of executive capacity without conveying an understanding of the beneficiary's daily tasks. See section 101(a)(44)(B)(i) and (ii).

The petitioner's descriptions of the beneficiary's job duties also indicates that it is the beneficiary who develops and approves long and short-term business plans and monitors and coordinates the business development of the petitioner and the overseas entity. The job description also indicates that initially the beneficiary directed the formulation of financial plans but at the time of response to the director's request for evidence the beneficiary was responsible for formulating financial plans and expansion strategies. Although these statements are general in nature, a liberal reading would support a conclusion that these duties are executive in nature. However, neither the petitioner nor counsel addresses the effect of the departure of the vice-president and the purchasing director on the beneficiary's executive tasks. It is not possible to discern that a majority of the beneficiary's duties now relate to the operational or policy management of the petitioner rather than to the operational activities themselves.

The petitioner's descriptions further indicate that the beneficiary directs purchasing, reviews and approves purchasing plans as well as directs exporting. The job descriptions of other individuals within the organization indicate that the petitioner has employees who implement the beneficiary's directions regarding these activities. The petitioner's descriptions also indicate

that the beneficiary reviews reports of new products and decides on new products although it is not clear who in the company prepares the reports. The beneficiary's direction of subordinate employees, however, is essentially the action of an individual performing the duties of a first-line supervisor rather than primarily making operational and policy decisions regarding these tasks.

Although it is not clear from the director's decision, that he based his decision even partially on the staffing levels of the petitioner rather than the nature of the petitioner's business and the type of the petitioner's employees, we will address the issue here. Section 101(a)(44)(C) of the Act requires that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a six-year-old trading company that claimed to have a gross annual income of \$6,323,378. The firm employed the beneficiary as president and chief executive officer. The petitioner also initially employed a vice-president, a purchasing manager, a purchasing director, an administrative and financial assistant, an import and export clerk, and a secretary. At the time of the petitioner's response to the director's request for evidence, the petitioner no longer employed a vice-president or a purchasing director. It is not sufficiently clear from the record that the petitioner is engaged in the type of business that could be generating the amount of gross receipts stated without a substantial staff and an executive to oversee the staff. However, because of the lack of information in the record supporting the nature of the gross receipts and whether the gross receipts were generated from a few items with great value or many smaller items of a lower value it is not possible to determine the actual reasonable needs of the petitioner. The petitioner has also not adequately explained the effect of the departure of the vice-president and the purchasing director. The petitioner has not provided sufficient position descriptions of the petitioner's staff that could lead to a conclusion that the staff on hand could reasonably fulfill the needs of the petitioner. The petitioner has not provided explanations, evidence, or general information on the issue of its reasonable needs other than the counsel's conclusory statement that the petitioner "has all the staffing and components needed." Such a conclusion not supported by the record cannot contribute to a finding that the beneficiary is acting in a managerial or executive capacity. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner noted that the Service had previously approved other L-1 petitions for this beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. This record of proceeding does not contain copies of the visa petitions that are claimed to have been previously approved. The Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It is not possible to determine from the record of this proceeding whether the previous approvals were based on unsupported assertions or general evidence. It is not possible to determine from this proceeding whether the previous approvals were based on different circumstances, staffing levels, and position descriptions.

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.

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