U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: WAC 98 254 51705 Office: CALIFORNIA SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The petitioner submitted a notice of appeal to the Associate Commissioner for Examinations. The Associate Commissioner noted that the petitioner had not submitted a brief in support of its appeal but considered the merits of the case based on the evidence in the record. The Associate Commissioner after review of the evidence dismissed the appeal. Counsel now submits a motion to reopen and states that a nine-page legal brief and twenty-five to thirty pages of additional documentation had been timely submitted for the Associate Commissioner's review. Counsel re-submits the nine-page brief and requests that the Service reopen the proceeding to consider the information contained in the brief. The motion to reopen will be granted. The petition will be denied.

The petitioner is a corporation organized in the State of California and is engaged in the manufacture and distribution of chord sets and surge suppressors. It seeks to employ the beneficiary as its president. Accordingly, it 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 provided a comprehensive description of the beneficiary's duties for the petitioner. The director also determined that the position descriptions of the petitioner's two other employees did not lead to a conclusion that the beneficiary would be managing a subordinate staff of professional, managerial or supervisory personnel. The director concluded that the petitioner had not demonstrated that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserted that the beneficiary qualified as an executive pursuant to the definition found in the regulations. Counsel confirmed that the beneficiary would not be acting in a managerial capacity.

The Associate Commissioner affirmed the director's decision noting the job description the petitioner had submitted did not establish that the beneficiary would be directing the management of the organization or a major component or function of the organization.

On motion, counsel for the petitioner asserts that the Service should consider the total company operation and indicates that the beneficiary is the president and chief executive officer of three separate operations including an operation located in Taiwan, an operation located in China, as well as the United States operation. Counsel indicates that the beneficiary will spend approximately twenty percent of his time overseeing the administration of the United States operation; approximately twenty percent of his time overseeing the research and development

function including patents; approximately twenty percent of his time managing personnel; approximately ten percent of his time on client development within the United States; approximately fifteen percent of his time overseeing the production facilities in China; and fifteen percent of his time overseeing research and development in Taiwan.

The issue in this proceeding is whether the beneficiary will be employed in an executive capacity for the petitioner.

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.

Upon review, the brief submitted on appeal and the letter submitted on motion are not persuasive. Counsel asserts that the beneficiary has already been a design engineer, a salesman and a first-line supervisor for the integrated organization and now is its chief executive and nothing else. Neither counsel nor the petitioner sufficiently expands upon the description of the beneficiary's duties for the petitioner. Counsel's allocation of the beneficiary's time spent with various companies and on general duties does not contribute to a finding of eligibility. 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). 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).

In addition, counsel does not address the Associate Commissioner's determination that the record lacks evidence that the beneficiary directs and controls the petitioner's operations through other individuals. Counsel does not address the Associate Commissioner's determination that a major job function of the beneficiary is to work with clients to alter or adapt the petitioner's products to the needs of clients, a technical job duty rather than an executive one. 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).

It is also not clear that the beneficiary will spend his time working primarily for the petitioner. It appears that the beneficiary will spend a significant portion of his time working for two related foreign entities. Although the two foreign entities appear related to the petitioner, the two entities are separate and distinct companies. Neither counsel nor the petitioner establish that the beneficiary's work for other organizations supports a claim that the beneficiary is primarily employed in an executive capacity for the petitioner.

The petitioner has not submitted sufficient evidence to overcome the initial determination of the director and the determination of the Associate Commissioner on appeal.

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. The petitioner has not sustained that burden. Accordingly, the previous decisions of the director and the Associate commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of July 3, 2001 is affirmed. The petition is denied.