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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 01 281 52649 Office: VERMONT SERVICE CENTER Date: JAN 22 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]

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

Myra L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the employment-based preference visa and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Delaware corporation that provides software products and services. It seeks to employ the beneficiary as its chief executive officer (CEO) and, therefore, endeavors to classify the beneficiary as a multinational executive or manager 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 denied the petition on the basis that the proffered position is neither executive nor managerial in nature.

On appeal, counsel submits a brief and copies of documents already included in the record of proceeding. Counsel states, in part, that the proffered position involves the management of an essential function.

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 petitioner claims to provide software products and services in all areas of radio propagation simulation, radio network planning, spectrum management, digital cartography, and command and control systems and spectrum monitoring. The petitioner employs four persons, has a gross annual income of $1.1 million, and is offering the beneficiary a salary of $65,000 per year as its chief executive officer. According to the petitioner, the beneficiary has been employed in the same capacity as the proffered position since January of 2000 in L-1A nonimmigrant status.

In the initial petition filing, the petitioner described the proffered position as follows:

> As Chief Executive Officer, [the beneficiary] is responsible for planning, developing and establishing policies and objectives for our United States operation and oversees all facets of the company (within the guidelines of the Board of Directors). [The beneficiary] plans business objectives, develops organizational policies and establishes responsibilities and procedures for obtaining objectives, as well as establishing international operating procedures for the United States operation. [The beneficiary] has authority to hire and fire staff, set up work and vacation schedules and approve bonuses and promotions. [The beneficiary] is also responsible for developing and maintaining our distribution network in the United States.
>
> As [the beneficiary] is responsible for obtaining business and developing organizational policies, he is managing a function which goes to the very essence of our business. His position is the highest level of the United States operation.

The director found the petitioner's initial description of the proffered position vague, and he requested a more detailed description of the proffered position including a breakdown of the number of hours that the beneficiary devotes to each of the proffered position's duties. The director also requested an organizational chart of the petitioner's operations and complete position descriptions of the petitioner's other employees.

In response, the petitioner expanded upon the duties of the proffered position. According to the petitioner, the proffered position involves establishing long term relationships with other companies and entities such as distributors, integrators and suppliers. In support of this claim, the petitioner submitted a copy of a contract between it and the U.S. Geological Department that the beneficiary negotiated in his position as the chief executive officer. The petitioner also submitted the requested organizational chart. According to this chart, the proffered position has supervisory authority over training and support engineering, cartography (database setups), and contract administration and office management. The petitioner did not, however, describe the duties associated with each of these positions.

The director denied the petition on the basis that the proffered position is not in an executive or managerial capacity. The director noted that the petitioner failed to submit the requested breakdown of the number of hours that the beneficiary devotes to each of the position's duties as well as position descriptions for its other employees. The director concluded that, without this information, "it is difficult to place the beneficiary within a

context that allows for an assessment of his day to day responsibilities." The director also found it incredible that 100% of the proffered position's duties involved managerial tasks.

On appeal, counsel states that it is impossible to provide an hourly breakdown of the duties of the proffered position, and that neither the statute nor the regulations requires the petitioner to present such evidence. According to counsel 100% of the duties of the proffered position are executive or managerial in nature. Counsel contends that "the day to day functions of the beneficiary are set forth with specificity," and claims that the beneficiary manages an essential function of the organization. Counsel further claims that the petitioner similarly detailed the executive nature of the proffered position.

Regarding information about the petitioner's other employees, counsel states that the proffered position has supervisory authority over two engineers, one of whom is responsible for training and support engineering while the other is responsible for cartography - database setup. Counsel also asserts that the proffered position has supervisory authority over an employee who performs "contract administration and office management" and claims that the proffered position has supervisory authority over the individuals who render the services of the petitioner's business.

Finally, counsel notes that the director cannot use the size of the petitioner's operations as a basis for denying the petition, and also maintains that the denial of this immigrant petition is an abuse of the director's discretion because the director failed to explain why it previously granted the beneficiary nonimmigrant L-1A status for the same position as the proffered position.

Pursuant to 8 C.F.R. 204.5(j)(2):

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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. Champion World, Inc. v. I.N.S., 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir.(Wash.) July 30, 1991) (emphasis in original).

The petitioner's description of the proffered position does not contain the level of detail that is needed in order to show that the proffered position primarily involves the high level responsibilities that are specified in the definitions of executive capacity and managerial capacity. The duties of the proffered position are described in broad terms, and are merely a reiteration of the definitions of executive capacity and managerial capacity.

For example, the petitioner claims that the beneficiary manages an essential function, which it describes as "obtaining business and developing organizational policies." The petitioner explains that the proffered position is responsible for planning, developing and establishing policies and objectives for its operations. The petitioner does not, however, identify the types of duties that the beneficiary would execute in order to perform these activities. More importantly, the job duty of

"obtaining business" is rather vague, as the duties associated with it may involve activities that would not be considered either executive or managerial in nature. Such an activity could involve routine sales and marketing duties.

Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F. 2d 41 (2d. Cir. 1990). Here, the petitioner has not provided any specificity to the job description of the proffered position. Instead, the petitioner relies upon its statements that 100% of the duties are executive or managerial in nature, and that the proffered position is responsible for managing an essential function. The petitioner's statements are insufficient evidence of the proffered position's level of authority and daily activities. Simply 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).

The petitioner's description of its organizational structure and operations are similarly vague. Counsel claims that the proffered position involves the supervision of employees who "render the services of the business." These employees are referred to as two engineers and one administrative person. The job duties of these employees are unknown to the Service because the petitioner failed to provide such information despite the director's request. The petitioner has not identified how two engineers and one administrative employee provide the services of a business that is involved in providing software products and their associated services to customers. The actual duties themselves reveal the true nature of the employment. Fedin Bros. Co., Ltd. v. Sava, supra. Here, the petitioner has not sustained its burden of establishing that the petitioner's three employees provide the products and/or the services of its business.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001). If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development.

Here, the staffing levels of the petitioner's operations are not a determining factor in the denial of the petition. Rather, it is the petitioner's generalized job description of the proffered position and its lack of job descriptions for its other employees that render the beneficiary ineligible for classification as a

multinational executive or manager. The petitioner has not established its need for the services of a purported executive/managerial employee. It is evident from a view of the documents in the record that, at the time of filing the petition, the reasonable needs of the petitioner required its purported executive/manager to engage in non-qualifying duties. For the reasons stated above, the petitioner has not met its burden of establishing that the proffered position is in an executive or managerial capacity.

Counsel claims that the Service's failure to explain its reasons for denying the immigrant petition when it approved a nonimmigrant L-1A petition for the same position as the proffered position is an abuse of discretion. However, 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. The Associate Commissioner is not bound by the rulings of the service centers. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct. 51 (U.S. 2001).

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, the petitioner has not met its burden of showing that the proffered position can be classified as a multinational executive or managerial position. For these reasons, the petition must be denied.

ORDER: The appeal is dismissed.