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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: EAC 01 174 53471 Office: VERMONT SERVICE CENTER Date: JAN 30 2003

IN RE: Petitioner: [redacted]
Beneficiary:

JAN 30 2003

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, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a document engineering company organized in the State of Delaware in November of 1998. It seeks to employ the beneficiary as its product 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 had been or would be employed in a primarily managerial or executive capacity for the foreign and United States entities.

On appeal, counsel for the petitioner asserts that the director ignored the petitioner's argument that the beneficiary manages a function as opposed to managing subordinate employees.

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 was employed in a managerial or executive capacity for the foreign entity and 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-
>
> 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 described the beneficiary's position for the foreign entity as a function managerial position. The petitioner stated that the beneficiary's managerial position included the following responsibilities:

> [The beneficiary] was responsible for defining new user requirements, redefining existing ones, and overseeing product definition. He also worked alongside Project Leaders, Engineering Directors, and Chief Architects at client sites to coordinate the technical work of the professional software and project engineers who assumed the direct technical duties at client sites. [The beneficiary] led and coordinated the professional responsibilities of these individuals by providing technical direction and leadership, selecting the appropriate members for a specific team based on a client's needs, and participated in the recruitment and training of professional consultants. Further, he developed plans for efficient use of employees, reviewed production costs and product quality and modified production and inventory control programs to maintain and enhance profitable operation of division. Finally, [the beneficiary] recommended budgets to other management personnel and worked closely with executives of [the parent company's] clients to determine the technical needs of the company.

The petitioner further identified the beneficiary's position with the foreign entity as "essential to the marketing of [the parent company's] product by maintaining a technical liaison between our worldwide customer partners and domestic R&D in order to satisfy demand and keep abreast of technology advancements."

The petitioner identified the beneficiary's position with the United States company as a product manager, a position that is "absolutely essential to the marketing of [the company's] product by maintaining a technical liaison between customers, partners throughout the United States and domestic R&D." The petitioner indicated that the beneficiary would continue "to manage software product definition and implementation" and would continue "to assume overall responsibilities for the market acceptance of the [company's] products, as well as the adoption by the US market and strategic business partners." The petitioner also stated that the beneficiary would be responsible for product marketing to "OEM" partners and for maintaining a competitive edge and for ensuring that the Paris based research and development incorporated the required features and functionality of the product.

The director requested additional information regarding the

beneficiary's duties for the foreign entity and the United States entity primarily relating to the number of the beneficiary's subordinates.

In response, the petitioner stressed that the beneficiary's position both for the foreign entity and for the United States entity was a functional managerial position. The petitioner identified the same managerial functions as noted above for the beneficiary's foreign entity position and ascribed a percentage of time to each of the duties. The petitioner also reiterated the beneficiary's managerial duties for the United States entity as provided in the petition as follows:

> Manages software product definition and implementation; assumes overall responsibilities for the market acceptance of the products; assumes overall responsibilities for adoption by the U.S. Market and strategic business partners; ensures required features and functionality of the product are incorporated by the France-based research and development divisions; and manages, deploys and supports early versions of new products when they are released with direct communication line to engineering in France - 45 %
>
> Maintains contact with senior executives at client and partner organizations to define levels of expectation and to align product plans - 10 %
>
> Works with senior executives of the company - 10 %
>
> Manages product marketing to OEM partners, including global industry players such as Xerox and IBM, as well as industry specialists such as JustInTime Solutions and Scitex - 10 %
>
> Assesses how to maintain competitive edge of company's Open Print range of products - 5 %
>
> Directs definition, development and deployment, internally (company use) and externally (partners' use) of products demonstration kits - 20%

The director determined that the record indicated that the beneficiary had and would perform duties that appeared to relate to the operational aspects of the departments he managed as opposed to being primarily involved in the management of the departments both in the United States and abroad. The director also determined that the letter submitted in response to the director's request for evidence had little probative value because it only contained assertions of counsel. The director concluded that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel asserts that the Service is ignoring the functional manager definition contained in the Act. Counsel asserts that the beneficiary is continuing the managerial activity he had in France and that most of the beneficiary's listed duties have the end result of determining the work of others. Counsel further asserts that the letter submitted in response to the director's request for evidence was signed and certified by the petitioner as facts represented by the petitioner.

The Associate Commissioner notes that the letter submitted in response to the director's request for evidence was signed by a representative of the petitioner and sets forth representations of the petitioner. However, considering the record in its entirety, we do not find counsel's overall assertions persuasive. Although the petitioner through its counsel has provided a description of the company's mission and organization, the description of the duties and responsibilities of the beneficiary's position remains vague. To establish that the beneficiary's position both overseas and in the United States is a functional manager position, the function managed must be described with specificity. The function the petitioner claims the beneficiary manages appears to be "overseeing product definition" for both the foreign entity and the United States petitioner. This function appears to include determining product requirements, coordinating the technical work of project engineers, training professional consultants, recommending budgets, and developing plans and programs to enhance profitable operations for the foreign entity. This function appears to include managing the software implementation, ensuring required features and functionality of the product are incorporated, deploying and supporting early versions of new products, maintaining the company's competitive edge, managing the product marketing to partners, and developing product demonstration kits for the United States entity. It is not possible to determine from the record and the general description provided whether the beneficiary will primarily be serving the "product definition" function or will be managing the function. 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).

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). However, upon review, the petitioner has not clearly set out the beneficiary's daily tasks as those tasks relate to the function of "product definition." We are unable to discern whom the beneficiary is directing to carry out the operational tasks associated with the function. We note that the petitioner states that many of the beneficiary's duties and responsibilities result in the work of others. But these statements are not supported in the record. 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). For example, the petitioner's organizational chart reflects that the product manager for the United States entity is self sufficient, that is the product manager does not manage other individuals. Yet the petitioner states that the beneficiary's management of the "product definition" function results in work for others. We note that the beneficiary works with engineers, recruits and trains professional consultants, works with executives to determine technical needs, and is involved in product marketing, but these associations do not clearly explain who is primarily performing the tasks of the "product definition" function if not for the beneficiary.

Moreover, the petitioner does not fully delineate how the "product definition" function was essential to the foreign entity and is essential to the marketing of the parent company's products. The petitioner states that the function is essential because it relates to the marketing of the parent company's products and this somehow requires maintenance of a technical liaison among departments of the company. The essential nature of the function however, is not clearly apparent.

The petitioner has not provided a comprehensive job description that describes how the beneficiary will meet all four criteria set out in the statutory definition of manager, even when evaluating the position solely as a functional manager position. The petitioner also has not established the essential nature of the managerial function; the record is deficient in this regard.

Upon review, the petitioner has not provided sufficient, comprehensible evidence to conclude that the beneficiary will be employed in a primarily functional managerial capacity. The descriptions of the beneficiary's job duties are general and fail to sufficiently describe his actual day-to-day duties. The petitioner has not established that the beneficiary has been or will be employed in a primarily functional managerial capacity.

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.