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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 01 180 54419 Office: VERMONT SERVICE CENTER Date: JAN 31 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, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation organized under the laws of the State of Delaware. It supplies computer systems around the world. It seeks to employ the beneficiary as its product manager managing a specific operating system within the business unit of the petitioner's business critical servers group. 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's duties for the foreign employer had been primarily executive or managerial in nature.

On appeal, counsel for the petitioner asserts that the beneficiary, in the three years preceding the time of the petitioner's application on his behalf, had been employed by the petitioner's overseas subsidiary in a capacity that is managerial.

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):
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> * * *
>
> (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).

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
>
> > (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
> >
> > (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
> >
> > (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
> >
> > (D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary performed primarily managerial duties for the foreign employer prior to entering the United States as a nonimmigrant.

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;

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.

The petitioner through its immigration consultant initially stated that the beneficiary had worked as a technical consultant for the Europe, Middle East, and Africa (EMEA) pre-sales technical support team of the overseas employer. In this position he was responsible for ensuring customer satisfaction within the software subsection and was responsible for the overall quality of answers on software related technical questions. The petitioner stated that this responsibility included ensuring that team members provided accurate information in response to all customer queries. The petitioner also stated that the beneficiary was a member of the "I-Team", a team of individuals who reviewed and influenced corporate business practices. In this position he was responsible for providing feedback on the performance of other agents relating to software assistance. The petitioner further stated that the beneficiary was responsible on a daily basis for the software query workload and ensuring that the work was divided up among fellow teammates.

The director requested further information on the beneficiary's duties for the foreign employer as well as the job titles and duties of the employees he managed. The director also requested the number of individuals on the pre-sales support team and how much time the beneficiary allotted to managerial duties and how much to non-managerial, technical support.

In response to the director's request, the petitioner provided a letter from the team manager of the EMEA presales support center. The team manager indicated that one of the main tasks of the

multi-lingual team was to answer technical pre-sales inquiries on the employer's products. The team manager noted that the beneficiary played a key role on the team managing the quality of answers to all software queries and also attended to some of the more complex technical issues. The team manager noted that as the "people manager" he consulted with the beneficiary on the performance and remuneration of individuals within the team.

The petitioner's immigration consultant provided a breakdown of hours devoted to each of the beneficiary's duties as follows:

40%	Managing Quality Assurance of Software Responses.
20%	Answering Advanced Queries.
12.5%	Following-up Advanced Escalations.
10%	I-Team preparation and meetings.
10%	Personal Training (workload permitting).
5%	Team meetings.
2.5%	Meeting with manager.

The petitioner also provided an organizational chart for the EMEA pre-sales support center. The chart reflected, in pertinent part, a team manager over four subsections. The beneficiary was depicted as subordinate to the team manager and as a team leader over four individuals. The petitioner identified the four individuals as software engineers with specific areas of responsibility.

The director recognized that the beneficiary had been the senior member of his team in his overseas position as a technical consultant. However, the director determined from the position description provided that the beneficiary did not spend his time primarily on managerial duties. The director noted that the beneficiary was a senior member of a team of four with the added responsibilities associated with being the most senior individual on the team. The director concluded that the record did not establish that the beneficiary had at least one year of full-time employment in a managerial or executive level capacity with a qualifying entity within the three-year period preceding the filing of the petition.

On appeal, counsel for the petitioner submits a letter from the director of the EMEA pre-sales and competence center. The EMEA director states that the beneficiary provided managerial guidance in the daily activities of four engineers and the overall pre-sales team. The EMEA director adds that the beneficiary had the authority to recommend personnel actions. The EMEA director also states that the beneficiary had responsibility for the quality of work which emanated from the software team and that this entailed checking all work done by the other team members and taking proper steps to address discrepancies including training and possible dismissal if substandard work continued to be performed. The EMEA director further states that the beneficiary assumed a managerial function by serving as a liaison between the EMEA pre-sales

support center and global software business teams as part of the I-Team.

Counsel also submits a breakdown of the beneficiary's managerial responsibilities abroad and indicates that this breakdown is a more accurate percentage summary than previously provided. Counsel states that the beneficiary spent 30% of his time "exercising wide discretion in the day-to-day critical activities of four software professionals," and "exercising discretion to make or recommend personnel actions, including, hiring, termination, promotion and leave-of-absence authorization." Counsel states that the beneficiary spent an additional 30% of his time "applying proprietary and specialized knowledge of system methodologies to manage and oversee the training of [the overseas employer's] professional EMEA software consultants . . . ." Counsel states that the beneficiary spent an additional 20% of his time "managing and verifying the critical integrity and reliability of software/hardware configurations, solutions, and proposals presented to end users and . . . makes critical decisions daily on whether the configurations, solutions, and proposals are in compliance with regulatory, company, and client quality assurance requirements." Counsel states that the beneficiary spent an additional 10% of his time "exercising critical discretion in the key activities of the 'I-Team'." Counsel states that the beneficiary spent an additional 10% of his time "overseeing and coordinating with upper management executives, engineers, and consultants from various departments to strategize company goals and ensure that system duties and objectives are met as it relates to the product."

Counsel asserts that the breakdown of the beneficiary's duties as referenced on appeal show that the beneficiary performed managerial duties above and beyond a first-line supervisor. Counsel asserts further that the beneficiary's technical expertise was relied upon to manage the critical function of quality assurance control for a highly visible unit of the overseas employer's international operations.

Upon review, counsel's assertions are not persuasive. An individual who claims to be employed in a managerial position must meet each of the four elements of the managerial definition set out in the Act. In this proceeding, counsel claims that the beneficiary performed managerial duties beyond that of a first-line supervisor and also managed the critical function of quality assurance control. In examining each element of the managerial capacity definition and the petitioner's description of the beneficiary's job duties, the Service cannot conclude that the beneficiary primarily performed in a managerial capacity for the overseas employer.

When looking at the first element of the managerial definition, the petitioner must demonstrate that the beneficiary managed the organization, or a department, subdivision, function, or component

of the organization. The description of the beneficiary's job duties does not support the claim that the petitioner established this first requirement. The petitioner's initial statement of the beneficiary's duties is that of an individual primarily performing the everyday non-managerial tasks of the software subdivision of the EMEA pre-sales support center. 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 beneficiary was responsible for "ensuring customer satisfaction" and the "overall quality of answers on software related technical questions." This information indicates that the beneficiary as the senior member of the team and the individual with the most knowledge of the petitioner's software, made sure that his fellow team members provided accurate information. The petitioner does not allude to any managerial responsibility in this role. In response to the director's request for evidence the team manager of the EMEA pre-sales support center provided the most responsive description of the beneficiary's duties by explaining that the beneficiary managed the quality of answers and attended to some of the more complex technical issues. Although the team manager used the word "managed" in his description, the beneficiary, as the senior member of the team with the most experience and knowledge, essentially monitored and mentored his team members making sure their answers were accurate and answering the more complex technical questions himself. The petitioner's immigration consultant indicated that the beneficiary spent approximately 60 percent of his time performing these two duties. Neither of the descriptions provided is sufficient to establish that the beneficiary was "managing the subdivision" rather than performing the essential activities of the subdivision.

Likewise, counsel's assertion that the beneficiary was managing the critical function of quality assurance control for the overseas employer is not persuasive. It is apparent that the beneficiary was performing tasks that were essential to the EMEA pre-sales subdivision of the overseas employer. However the descriptions provided are not sufficient to support the claim that the beneficiary managed the critical function of quality assurance rather than primarily performing the function. Although, the Service recognizes this beneficiary's advanced knowledge in his software field, expertise in a particular field does not require a conclusion that the expert is also a manager of that particular field or function.

On appeal, the petitioner's EMEA director could only reiterate that the beneficiary "provided managerial guidance in the daily activities of four engineers and the overall pre-sales team." Providing guidance again indicates that the beneficiary does have experience and is looked to as an individual with specialized knowledge in his area of expertise, but does not conclusively describe an individual managing a subdivision or component of the

overseas employer. Contrary to counsel's claim of providing a more accurate depiction, the breakdown of the beneficiary's duties provided on appeal actually provides a more vague and confusing description of the beneficiary's duties. It appears that counsel is contending that the beneficiary spent 50 percent of his time performing the quality assurance function (30 percent providing guidance and 20 percent making sure of the integrity of his teams answers to end users were accurate). Counsel appears to delete the 20 percent of the time spent by the beneficiary answering more advanced inquiries. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). Counsel's offer of the allegedly more accurate description is submitted without adequate explanation of the implied inaccuracy of the previous summary and is not supported by independent evidence in the record. It is not possible to discern from counsel's general and conclusory statements that the beneficiary was primarily managing an essential function of the overseas employer.

In addition, the petitioner has not established that the beneficiary directly supervised other employees. Initially, the team manager indicated that as the "people manager" he consulted with the beneficiary on the performance and remuneration of individuals within the beneficiary's team. This statement certainly implies that the team manager believed that he was the direct supervisor of the beneficiary and the beneficiary's team rather than the beneficiary performing the supervisory duties. The petitioner's immigration consultant does not depict the beneficiary spending any portion of his time supervising other individuals. On appeal, the EMEA director indicates that the beneficiary checked the work of his team members and recommended training or dismissal if the work was substandard. Counsel in the allegedly more accurate description of how the beneficiary spent his time also notes that the beneficiary spent a portion of his time recommending personnel actions. Reviewing these statements in the broadest possible context, it appears that the beneficiary may have spent a portion of his time making recommendations regarding the abilities of the other team members; however, this duty does not appear to be the beneficiary's primary duty. Rather, the beneficiary as an expert and mentor to other team members necessarily noted their accomplishments and failures to the pre-sales team manager. The beneficiary did not directly supervise and control the work of other supervisory, professional or managerial employees and as determined above did not manage an essential function. The petitioner has not demonstrated that the beneficiary as met the requirements of the second element of the managerial definition. See section 101(a)(44)(A)(ii) of the Act.

Further, the organizational structure of the pre-sales support

center does not show that the beneficiary functioned at a senior level within the organizational hierarchy or with respect to a function managed. The organizational chart shows the beneficiary grouped with his team at the lower level of the pre-sales support center hierarchy. The beneficiary does not directly supervise anyone and is under the direct supervision of a team manager who reports to the pre-sales support center director. As noted above, the evidence submitted depicts the beneficiary as primarily performing the quality control function rather than managing the function. The evidence submitted does not demonstrate that the beneficiary meets the third element of the definition of managerial capacity. See section 101(a)(44)(A)(iii) of the Act.

Finally, the petitioner has provided sufficient information to indicate that the beneficiary exercises discretion over the day-to-day operations of the activity or function for which the beneficiary has authority. However, complying with one element of the managerial definition is not sufficient to establish that an individual is primarily acting in a 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.