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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

APR 18 2003

File: WAC 01 278 52161 Office: CALIFORNIA SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:

[redacted] PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Roger Pierson
for 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in July 1992. It is engaged in software development and provides Internet services. It seeks to employ the beneficiary as manager of its software development department. 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 had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the director erred in determining that the job duties of the manager of software development did not meet the criteria set out in the definition of managerial capacity.

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).

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-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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-
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> 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 stated that the beneficiary was responsible for the management and direction of its billing, provisional, and customer care software, specifically identified as RODOPI software. The petitioner indicated that the beneficiary supervised software programmers and support personnel, assigned tasks, met with members of the top management team, and made recommendations regarding personnel decisions on members of his team.

The director requested a more detailed description of the beneficiary's duties including the percentage of time the beneficiary spent on each duty. The director also requested the petitioner's organizational chart clearly identifying the beneficiary's position on the chart and listing all employees under the beneficiary's supervision. The director specifically requested a brief job description, the educational level, and annual salaries for all the employees under the beneficiary's supervision.

In response, the petitioner stated that the beneficiary spent approximately 30 percent of his time supervising and directing software programmers and support personnel. The petitioner stated that the beneficiary spent an additional 20 percent of his time explaining and assigning specific tasks to his subordinates. The petitioner stated the beneficiary spent 25 percent of his time exercising discretion in establishing objectives, guidelines, and deadlines for the personnel under his direction. The petitioner stated that the beneficiary spent the remaining 25 percent of his time meeting with top management, preparing reports and presentations of those reports, and preparing requests and evaluations of current staff.

The petitioner also included its organizational chart. The chart depicted the beneficiary as the head of the software development and implementation department. The chart depicted five developers, one software engineer, and one "sup. of implementation" person reporting to the beneficiary. The chart listed the salary of each of these individuals and their immigration status but did not provide a description of their duties or educational levels.

The director determined that the petitioner had not established that the beneficiary would be managing professionals and had not established that the beneficiary was or would be a functional manager of the development department. The director also

determined that the duties of the beneficiary's position did not qualify the beneficiary as an executive.

On appeal, counsel for the petitioner asserts that the beneficiary spends approximately 80 percent of his time performing managerial functions as described in the petitioner's response to the request for evidence. Counsel also asserts that the director erred in implying that software developers do not hold professional positions. Counsel also submits descriptions of the job duties for the individuals under the supervision of the beneficiary and asserts that all the positions subordinate to the beneficiary require a bachelor degree.

Counsel's assertions are not persuasive. The director specifically requested brief job descriptions for the employees under the beneficiary's supervision in his request for additional evidence. Such a description may have contributed to a better understanding of the positions subordinate to the beneficiary. The director correctly determined that the record was deficient in establishing that these positions were professional positions. Counsel's submission of job descriptions and assertion that these positions require a bachelor degree on appeal will not be considered by the AAO. Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also* 8 C.F.R. § 103.2(b)(14).

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). The description of the beneficiary's job duties is for a supervisory position. The beneficiary spends 50 percent of his time supervising, explaining, and assigning tasks to his subordinate staff. The beneficiary spends another 25 percent of his time preparing reports for meetings with management and on personnel issues. These duties also appear to be duties partially associated with supervisory duties. Upon review of the petitioner's organizational chart it is clear that the beneficiary holds a first-line supervisory position. A first-line supervisor, however, 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. *See* section 101(a)(44)(A)(iv) of the Act. Hence, it is important for the petitioner to establish that the beneficiary's subordinate staff holds professional positions.

The petitioner's description regarding the remaining 25 percent of the beneficiary's time spent exercising discretion in establishing objectives, guidelines, and deadlines for his staff is unclear. It is not clear if the petitioner is indicating that the beneficiary spends 25 percent of his time establishing goals and policies, as

found in the definition of executive capacity, or is attempting to indicate that the beneficiary, as a supervisor, is setting performance standards for his subordinates. In either case, it cannot be concluded from this statement that the beneficiary is acting in a managerial or executive capacity.

In sum, counsel has not presented sufficient probative evidence on appeal to overcome the director's decision.

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.