B4

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass Ave., 3rd Floor
Washington, D.C. 20536

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

FILE: WAC 01 245 57112 Office: CALIFORNIA SERVICE CENTER Date: JUL 08 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)

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference 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 was incorporated in 1994 in the State of Minnesota and is claimed to be a wholly-owned subsidiary of [redacted], located in Canada. The petitioner is a commercial framing contractor. It seeks to employ the beneficiary as its site supervisor. 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 managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of the petitioner's claims. Additional evidence is submitted.

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 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 which 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 beneficiary has been and will be performing managerial or executive duties.

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.

In the initial filing, the petitioner described the beneficiary's prospective duties as follows:

> [The beneficiary] directs construction projects through subordinate Managers, Floor Specialists, Roof Specialists, and work crews. He approves the hiring and firing of all labor on the recommendations of the Manager. He supervises approximately 25 workers through subordinate managers. He reviews and approves the budget estimated for the project and manages the project within budget. He drafts all change orders, plans and engages the overhead crane services and telescoping fork lifts in accordance with project planning. He is responsible for a budget of approximately $500,000, the approximate estimate of most jobs.

On December 5, 2001, the director instructed the petitioner to submit in part, its organizational chart identifying the

beneficiary's position, a more detailed description of the beneficiary's job duties indicating the percentage of time spent performing each duty, and a list of all of the employees under the beneficiary's supervision. The petitioner was asked to provide brief job descriptions, educational levels, and salaries/wages of all of the beneficiary's subordinates, as well as state quarterly wage reports for all employees.

In response, the petitioner submitted a sworn declaration from the petitioner's vice president who provided the following description of the beneficiary's job duties:

> [The beneficiary] directs construction projects through subordinate Managers, Floor Specialists, Roof Specialists, Roof Specialists [sic], and work crews. The Site Manager on the recommendation of the Manager approves the hiring and firing of all labor. He supervises approximately 25 workers through subordinate managers. He reviews and approves the budget estimated for the project by the Director of Construction and manages the project within budget. He approves the Manager's expenditures within budget. He drafts all change orders. He submits material orders requested by the Manager to the owner for approval and orders materials required. He plans and engages the overhead crane services and telescoping fork lifts in accordance with project planning. He liaises [sic] with architects and engineers on the project on a daily basis. He institutes and approves the Hunt safety program on the project. He is responsible for a budget of approximately $600,000 . . . .

The petitioner also provided the following percentage breakdown of the time spent performing the above duties:

- Directing Production to Subordinate Managers 10%
- Hiring and Firing Employees 5%
- Supervising approximately 25 employees 40%
- Reviewing Budget 5%
- Drafting Change Orders 5%
- Ordering Materials 5%
- Coordinating Cranes and Forklifts 10%

- Communicating with Architects and Engineers 10%
- Instituting the Hunt Safety Program 10%

The director denied the petition, basing her decision, in part, on the following generalization:

> The petitioning entity does not have a reasonable need for an executive because they are merely a construction site office made up of managers and workers with positions in the construction trade. This type of business does not require or have a reasonable need for an executive because of the nature of the job positions. At best, the highest-level employee for a business like this could be a General Manager . . . .

Although the appeal will be dismissed, it must be noted that the director based her decision, in part, on an improper standard. The director's above comments are inappropriate. The director should not hold a petitioner to her undefined and unsupported view of which type of trade can and cannot sustain an executive or managerial position. The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a construction business will not preclude the petitioner from qualifying the classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn, in part, as it relates to the reasonable needs of the petitioning business.

The director also concluded that the employees under the beneficiary's supervision could not be deemed professionals "because *they* are not managing professional employees." (Emphasis added in original). However, the definition of managerial capacity contained in section 101(a)(44)(A) of the Act applies to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager if the organization's ultimate, lower tier subordinate was not a

professional employee, regardless of how many layers of management lay between the beneficiary and the non-professional employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. In the present matter, the organization is structured so that the second tier, first-line supervisor relieves the beneficiary from supervising non-professional employees. Consequently, the beneficiary may not be disqualified based on the conclusion that he does not manage professional employees where the sole basis for such reasoning is that the second tier of managers supervises the petitioner's non-professional employees. For reasons stated in this paragraph, this portion of the director's decision will also be withdrawn.

The director also noted that the petitioner failed to indicate the beneficiary's name or the names of his subordinates on any of the designated positions in its organizational chart. She further pointed out the petitioner's failure to provide the state quarterly wage reports that were previously requested.

Although the petitioner provided, on appeal, the previously omitted documentation, case law precedent has established that where a petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, the Bureau will not consider evidence submitted on appeal for any purpose. Rather, the Bureau will adjudicate the appeal based on the record of proceedings before the director. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner desires further consideration of such evidence, the petitioner may file a new petition. As the petitioner in the instant case failed to submit evidence requested in the director's notice, the supplemental organizational chart and quarterly tax statement for the petitioner's first quarter of 2002, submitted on appeal, will not be considered. Without such information, the Bureau does not have sufficient documentation to confirm the petitioner's claim that the beneficiary manages the entire construction project through a variety of managerial and non-managerial personnel. 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).

Counsel asserts that the beneficiary has considerable discretionary authority over the petitioner's personnel, as well as its daily operations. While this claim may be accurate, the petitioner is still left with the burden of proving that the beneficiary either supervises the work of professional or managerial personnel, or that he manages an essential function of the organization. In either case, the petitioner must establish that individuals, other than the beneficiary, are performing the daily operational tasks of the organization, whether or not the beneficiary directly supervises such individuals. In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). In the instant case, the petitioner has indicated that 40% of the beneficiary's time is spent supervising approximately 25 individuals whose employment the petitioner has not verified with relevant documentation. The petitioner also indicates that another 15% of the beneficiary's time is spent ordering materials, a duty that is more administrative than managerial, and coordinating cranes and forklifts, another non-managerial task. Thus, at least 65% of the beneficiary's job cannot be described as managerial. 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).

On review, the record contains insufficient evidence to demonstrate that the beneficiary has been and will be employed in a *primarily* managerial or executive capacity. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Bureau is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the record lacks sufficient evidence to determine that the petitioning enterprise has a qualifying relationship with the claimed parent company. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a

qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International, supra;* see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church of Scientology International at 595.*

In the instant case, the Bureau instructed the petitioner to submit additional evidence providing proof of wire transfers from the parent company to establish that it actually purchased the petitioner's stock. However, the petitioner has not provided documentation that would establish that the foreign entity actually contributed funds to purchase the petitioning enterprise. As previously noted, 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, supra.* As this appeal will be dismissed on the grounds discussed above, the issue of a qualifying relationship need not be further addressed.

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.

ORDER: The appeal is dismissed.