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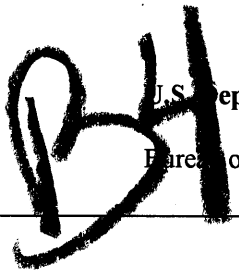

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

JUN 27 2003

FILE: WAC 01 277 54667 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]

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 Director of the California Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its software development manager. The petitioner, 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 because the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the beneficiary functions in a managerial capacity because he supervises a team of professional software engineers.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). 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 an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of the Korean entity, Willtech, Inc.; (2) manufactures and distributes telecommunications testing equipment; and (3) employs 19 persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1). The petitioner is offering to employ the beneficiary permanently at a salary of $60,000 per year.

The issue to be discussed in this proceeding is whether the proffered position of software development manager is in a managerial capacity. The Bureau notes that the petitioner is seeking to classify the beneficiary as a multinational manager pursuant to section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), which 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.

At the time of filing the petition with the California Service Center, the petitioner stated that the beneficiary would be responsible for managing and directing "the entire software development team." According to the petitioner, in his capacity as the manager of software development, the beneficiary would meet with telecommunications industry officials, represent the company at trade shows, and consult with clients. In an accompanying

organizational chart, the petitioner indicated that the beneficiary would supervise three software engineers.

The director did not find the petitioner's initial evidence sufficient to determine whether the beneficiary would be employed in a managerial capacity. Therefore, on January 2, 2002, the director requested additional evidence, to include:

- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific. Also, include a brief description of job duties, educational level, annual salaries/wages . . . for all employees under the beneficiary's supervision. Explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission. Also, indicate [the] percentage of time spent in each of the listed duties. (Emphasis in original.)

- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for all quarters for the year 2000, that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees. Highlight or otherwise designate all employees under the beneficiary's supervision. (If the United States [c]ompany is not located in California, submit the report of wages for the appropriate State.)

In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner stated:

> **SOFTWARE DEVELOPMENT AND MANAGEMENT**
> [The beneficiary] spent approximately **50%** of his time managing the software development department of [the petitioner], his software engineer[ing] staff. In overseeing and directing the development of software, he ensured that all activities were carried out to ensure optimum efficiency and profit maximization. He ensured that the departments [sic] projects and developments were globally competitive . . . . He engaged in software development, innovations, and testing. He oversaw various projects . . . . (Emphasis in original.)
>
> **PERSONNEL MANAGEMENT**
> [The beneficiary] spent approximately **20%** of his time in the supervision of his personnel, the software engineers. He held conferences, evaluations, [and] performance reviews of his staff. . . . In addition[,] . . . he was responsible for hiring, firing, [and] training employees, as well as delegating

> authority for various projects. . . . (Emphasis in original.)
>
> **TECHNICAL MANAGEMENT**
> [The beneficiary] spent approximately **10%** on overseeing and managing the technical development, growth, and quality of the company. He made technical specifications, suggestions and assignments. . . . (Emphasis in original.)
>
> **CUSTOMER SUPPORT MANAGEMENT**
> [The beneficiary] spent approximately **20%** of his time directing the customer support management of his [department] . . . . He researched and analyzed current trends and preferences in order to make specifications of [sic] software development. He assigned his software development department to obtain user feedback, suggestions, [and] comments . . . . (Emphasis in original.)

The petitioner also submitted the requested copies of its DE-6 forms. The petitioner highlighted the names of the two individuals supervised by the beneficiary in 2000. The petitioner also submitted DE-6 forms for 2001 and highlighted the two individuals under the beneficiary's supervision during that year.

In denying the petition, the director noted discrepancies between information in the submitted organizational chart and the DE-6 forms. According to the director, the petitioner indicated in the organizational chart that the beneficiary supervised three employees. The director further noted that, according to the DE-6 forms, the petitioner had employed only two of the three individuals on the chart at the time the petition was filed. Although the director noted that the two individuals were professionals, the director stated: "[T]he submitted evidence is insufficient to demonstrate that the beneficiary's assignment is primarily that of managing a subordinate staff of professional, managerial or supervisory personnel who relieves [sic] the beneficiary from performing non-qualifying duties."

On appeal, counsel states that the petitioner's description of the beneficiary's daily activities is sufficiently detailed. Counsel further states that, based upon the job description, a reasonable person would find that the proffered position is in a managerial capacity. Counsel also submits a new job description for the beneficiary, which includes duties, among others, such as: determine resource capacity and estimate project scope; develop a detailed product development plan; define risk management plans; oversee software development life-cycle; manage stressful conditions; provide leadership; set timeframes for milestones; set priorities; prepare and deliver presentations to senior managers and clients; and establish resource estimates.

Counsel submits job postings from the Internet for software engineering managers in various companies. Counsel states that the director's emphasis on the lack of detail in the beneficiary's job description was in error, as none of the job descriptions in the Internet postings is detailed, although each job involves managing a department or function.

Counsel asserts that the beneficiary has seven employees under his supervision, two of whom counsel identifies as managers. Counsel further maintains that, by denying the petition because the beneficiary supervised only two employees, the director relied inappropriately on the size of the petitioner and its staffing levels. Counsel states that, as the supervisor of two professional software engineers, the beneficiary would still qualify as a manager pursuant to 8 C.F.R. § 204.5(j)(4)(i). In support of his statements on appeal, counsel submits: photographs of the beneficiary at work; a spreadsheet of software development projects; job postings from the Internet for software development managers; paystubs and 2001 W-2 forms for some employees under the beneficiary's supervision; 2002 DE-6 forms; a purchase agreement between the petitioner and Sprint Spectrum L.P.; and documents relating to the educational backgrounds of the employees under the beneficiary's supervision.

Counsel's statements on appeal do not merit a withdrawal of the director's decision to deny the petition. Counsel's accompanying brief is replete with references to the beneficiary's *current* job duties and the number of employees *currently* supervised by the beneficiary. (Emphasis added.) However, the Bureau must determine the managerial capacity of a position based upon the facts that existed at the time the petition was filed. *See* 8 C.F.R. § 103.2(b)(12). When responding to a request for evidence or submitting evidence on appeal, a petitioner cannot materially change a position's level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary at the time the I-140 petition was filed merits classification as a multinational managerial position. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981).

At the time the petition was filed, the beneficiary supervised two software engineers, not five engineers and two managers as counsel now claims. Furthermore, it is not clear whether the job duties listed by counsel in his brief were executed by the beneficiary at the time the petition was filed, or whether the job duties are the beneficiary's current responsibilities now that his staff has expanded. Counsel's assertions regarding the beneficiary's alleged duties do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). In addition, the petitioner has not explained the inconsistencies between its

initial job description and the revised job description presented by counsel on appeal. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, the Bureau will determine the managerial nature of the proffered position based upon the petitioner's descriptions of the beneficiary's job that were previously submitted.

In the initial petition filing, the petitioner's description of the beneficiary's role with the company was not managerial. Although the petitioner stated that the beneficiary would manage a software development team, it failed to describe the precise activities the beneficiary would perform to manage the software development department. Additionally, when responding to the director's request for additional evidence regarding the beneficiary's job duties, the petitioner failed to sufficiently clarify the amount of time the beneficiary would devote to managerial responsibilities. The petitioner also failed to clarify how and at what frequency these managerial responsibilities would be performed.

According to the petitioner, the beneficiary spends 50 percent of his time "managing the software development department." However, one of the duties listed as falling under managing the department is "engag[ing] in software development, innovations, and testings." This duty indicates that the beneficiary performs tasks related to software development, rather than manages those tasks through other employees. The petitioner fails to quantify the amount of time that the beneficiary spends on developing and testing software versus the amount of time he spends managing software development. This failure of documentation is important because some of the beneficiary's responsibilities do not fall directly under traditional managerial duties. *IKEA US, Inc., v. U.S. Dept. of Justice I.N.S.*, 48 F. Supp. 2d 22 (D.D.C. 1999), *aff'd,* 1999 WL 825420 (D.C. Cir. 1999).

Another job responsibility of the beneficiary is to make "technical specifications, suggestions, and assignments." Again, this duty does not fall under a traditional managerial assignment, as it involves performing a task necessary for the petitioner to produce a product. Although this task does not occupy a large percentage of the beneficiary's time, it, nevertheless, indicates that the beneficiary does not primarily perform the high level responsibilities specified in the definition of managerial capacity.

The Bureau acknowledges counsel's assertion that the beneficiary's job descriptions may be sufficiently detailed when compared to job descriptions for similar positions posted on the Internet. However, because the regulation at 8 C.F.R. § 204.5(j)(5) requires a detailed job description from the petitioner to establish the managerial status of a proffered position, the amount of detail contained in an Internet job posting for a similar position is

irrelevant. A petitioner's job description and an Internet job posting serve two different purposes.

The Bureau now turns to counsel's statement that the beneficiary qualifies as a manager pursuant to 8 C.F.R. § 204.5(j)(4)(i) because he is a first-line supervisor to professional employees, who are software engineers. The Bureau notes that the record does not contain job descriptions for the two software engineers whom the beneficiary allegedly supervises. Although the titles of the positions indicate that they may be professional, a determination cannot be made without a thorough review of the employees' job descriptions. Accordingly, the Bureau cannot conclude that the beneficiary supervises professional employees.

Based upon the above discussion, the Bureau finds that the job offered to the beneficiary at the time the petition was filed does not merit classification as a multinational managerial position. 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.