

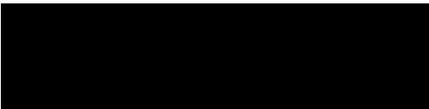
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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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



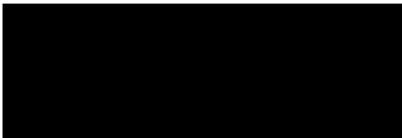
MUL 23 2008

File: WAC 02 046 55078 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
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:



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 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 company organized in the State of California in July 1999. It is engaged in the import and sale of automotive wheel parts. It seeks to employ the beneficiary as its president. 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's decision is in error.

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 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-

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 stated that the beneficiary's position for the United States company involved executive functions. The petitioner stated further that the beneficiary "is responsible for the developing and overseeing of all U.S. operations, including setting corporate policies, developing strategies for marketing, fiscal, and personnel matters."

The petitioner also provided its organizational chart depicting the beneficiary as president and chief financial officer. The chart also showed a business manager/administrator reporting directly to the beneficiary in his capacity as the chief financial officer and an operations department with three employees reporting to the business manager. The chart also depicted a marketing department with three employees reporting directly to the beneficiary in his capacity as the chief financial officer. The chart further depicted a separate department with one employee as the petitioner's liaison with the overseas entity. This individual also reported directly to the beneficiary in his role as the chief financial officer.

The petitioner also submitted its California Form DE-6, Quarterly Wage and Withholding Report for the quarter ending prior to the petition being filed. The California Form DE-6 showed seven employees including the beneficiary. The employees on the California Form DE-6 corresponded to the positions of president/chief financial officer, business manager/administrator, two operations positions reporting to the business manager, liaison to the overseas company, and one position in the marketing department on the organizational chart. One employee identified on the California Form DE-6 could not be matched with any position on the organizational chart.

The director requested additional evidence in two parts. The director's first request asked for a more detailed description of the beneficiary's duties in the United States. The director's second request asked specifically for the petitioner's organizational chart clearly identifying the beneficiary's position and all employees under the beneficiary's supervision. The director also requested a description of job duties for all employees under the beneficiary's supervision.

In response, the petitioner provided a day-to-day description of the beneficiary's duties and examples of the beneficiary's

decision-making for the previous six months.¹ The petitioner also provided a revised organizational chart for each of its responses to the director's two requests. The petitioner's first revised organizational chart submitted in May 2002 depicted the beneficiary as president supervising the marketing, operations, and administrative/finance departments. The marketing manager's position was described as directing marketing and national sales. The chart indicated that a salesperson and customer service employee reported to the marketing manager. The operations manager's position was described as involving daily operations and quality control. The chart showed a warehouse manager reporting directly to the operations manager. The warehouse manager, in turn, supervised the shipping, receiving, and transportation departments. The shipping, receiving, and transportation departments included seven employees. The administrative/financial manager's position was described as including the implementation of company goals and objectives and maintenance of the accounting and administrative functions. The chart reflected the individual who formerly reported directly to the beneficiary as the company's liaison to the overseas company, as now reporting to the administrative/financial manager. The only individuals corresponding to the petitioner's California Form DE-6 held the positions of president, administrative/financial manager, warehouse manager, and the individual now reporting to the administrative/financial manager.

The petitioner's second revised organizational chart submitted in September 2002 shows the beneficiary as president supervising a research and development department, a warehouse department, an administrative/finance department, and three divisions. The former operations manager is now depicted as the research and development director supervising one individual. The warehouse manager now reports directly to the president but continues to supervise the shipping, receiving, and transportation departments. The administrative and finance/business manager continues to report directly to the president but no longer supervises anyone. The petitioner's three divisions appear to be involved in the marketing and sale of the petitioner's products. The petitioner also provides an employee list showing the educational level and salary level of each of the employees on the organizational chart.

The director based his determination on the ground that the beneficiary did not supervise professional employees. The director determined that the nature of the petitioner's business, wholesale trade of auto motor parts, did not involve or require professional employees. The director also determined that the beneficiary's job description indicated that he was involved in the day-to-day operations of the business. The director concluded that the

¹ The director listed the petitioner's description of the beneficiary's job duties and decision-making in his decision; thus, the description will be repeated only in relevant part here.

petitioner's staffing levels of six managers in an organization of 17 employees did not appear sufficiently complex to warrant an individual acting in an executive or managerial capacity.

On appeal, counsel asserts that the beneficiary supervises professional employees and that the positions supervised are professional positions. Counsel provides detailed job descriptions for the business manager, research and development director, and the marketing and sales director of one of the petitioner's sales divisions and asserts that these individuals and the positions held by these employees require professional employees. Counsel also asserts that the beneficiary is employed in an executive position; and that the beneficiary directs the management of the entire U.S. operations, has the authority to hire and fire, and supervises professional and/or managerial workers employed in professional positions.

Counsel's assertions are not persuasive. The petition fails on two counts. First, when 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). The petitioner's job description for the beneficiary's position indicates the beneficiary holds daily meetings, authorizes strategy and marketing goals, authorizes returns and replacement reports submitted by the warehouse manager, evaluates the employees' weekly plan report, authorizes disbursements of company checks, approves purchases, advises and assigns advertisements to the marketing manager, authorizes design of new models and evaluates progress, sets up new goals and objectives, delegates duties, and communicates daily with the offshore manufacturer. The petitioner's examples of the beneficiary's decision-making includes negotiating wheel advertisements, hiring a sales and marketing manager for a new division, initiating design patents for six products, finalizing design patents for two products, authorizing a rack system for the warehouse, signing a new warehouse lease, authorizing Internet banking, negotiating price adjustments, price levels, terms, and warranties, hiring legal representation, and directing the design of new wheels.

It is not possible to determine from the description of job duties and the examples of decision-making whether the beneficiary will be primarily involved in performing executive duties or whether he will be primarily involved in designing the petitioner's products, performing administrative functions, and negotiating sales contracts. 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 petitioner has not provided a breakdown of the beneficiary's duties and the time spent on each of the beneficiary's duties. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C.

1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Second, the petitioner has not provided supporting documentary evidence of its employees and their job duties at the time the petition was filed. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner noted on the Form I-140, Immigrant Petition for Alien Worker, that it employed six individuals. The petitioner's California Form DE-6 for the quarter preceding the filing of the petition showed seven individuals employed in that quarter, although only six employees could be identified on the petitioner's original organizational chart. The petitioner's verifiable employees at the time the petition was filed appear to be the beneficiary, the business manager in charge of finance and administration, a sales representative for California, a liaison to the overseas company, a warehouse and operations manager, and one warehouse/operations employee. The record does not contain sufficient consistent evidence regarding the roles of each of the petitioner's employees to determine that the beneficiary would be relieved from performing non-qualifying duties. 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).

In sum, the record does not provide a complete understanding of the beneficiary's role for the petitioner at the time the petition was filed. The petitioner's subsequent information submitted in response to the director's request for evidence does not offer explanations regarding the changes in the organization or clarify the roles of each of the petitioner's employees. The AAO declines to speculate on whether the beneficiary's primary assignment was in an executive capacity at the time the petition was filed.

The petitioner also does not demonstrate that the beneficiary's primary assignment is in a managerial capacity. As previously stated, the petitioner failed to provide sufficient consistent evidence regarding the roles of each of the petitioner's employees identified as "managers" or "supervisors" on the petitioner's original organizational chart. The record is deficient because it does not show whether the beneficiary supervised managerial or supervisory employees at the time the petition was filed. Likewise, the petitioner did not provide evidence that the employees the beneficiary supervised were professional employees or held professional positions. The brief descriptions provided in response to the director's requests for evidence did not include

sufficient information to establish that any of the petitioner's employees were employed in professional positions. Counsel does not provide evidence that the research and development director or the marketing and sales director were employed at the time the petition was filed. The petitioner's administrative and financial/business manager, although employed at the time the petition was filed, reported to the beneficiary as the chief financial officer, indicating that the beneficiary was responsible for the petitioner's financial matters, not this individual.

Although the appeal will be dismissed, it must be noted that the director's determination regarding the lack of professional positions subordinate to the beneficiary appears to be a minor deficiency in the record. The director's conclusion that the petitioner's business would not involve or require professional employees is unsupported. In addition, the petitioner's lack of professional employees is not directly relevant to the petitioner's request that the beneficiary be considered an executive. The director should focus on applying the statute and regulations to the facts presented by the record of proceeding. In this case, the facts, including the petitioner's indeterminate job description for the beneficiary and lack of verifiable employees to carry out the operational and administrative tasks of the petitioner thereby relieving the beneficiary to focus primarily on executive duties, are the facts most relevant to this proceeding. Moreover, the petitioner's lack of verifiable employees and their roles for the petitioner at the time of filing is far more relevant to this case than the director's unsupported conclusion that a company with 17 employees is not sufficiently complex to warrant six managers and an individual acting in an executive or managerial capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 91 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.