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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 24 2003

FILE: WAC 01 245 57604 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)

IN 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 a project leader. 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 on the grounds that: (1) the petitioner does not have the ability to pay the proffered wage; (2) the proffered position is not in an executive or managerial capacity; and (3) the foreign entity did not employ the beneficiary in an executive or managerial capacity for at least one year in the three years preceding his entry into the United States in a nonimmigrant status.

On appeal, counsel submits a brief, new evidence, and a copy of some evidence already included in the record. Counsel states, in part, that the beneficiary has been and will continue to be employed in a managerial capacity, and the petitioner has the ability to pay the beneficiary's salary.

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 [redacted] of India; (2) specializes in developing software and consulting on software development; and (3) employs 44 persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of $93,400 per year.

The first issue to be discussed in this proceeding is whether the beneficiary has the ability to pay the proffered yearly salary of $93,400.

Pursuant to 8 C.F.R. § 204.5(g)(2):

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . .

At the time of filing the I-140 petition with the California Service Center on June 4, 2001, the petitioner submitted some evidence of its financial position, including copies of: its 1999 federal income tax returns; its 1998, 1999, and 2000 W-3 forms; and Form DE-6 for the four quarters in 2000 and the first quarter in 2001. The director was not satisfied with this evidence as it related to the petitioner's ability to pay the beneficiary's salary. Therefore, on December 10, 2001, the director requested copies of annual reports, federal tax returns, or audited financial statements. In response, counsel stated that the petitioner was submitting date-stamped computer printouts from the Internal Revenue Service (IRS) of tax returns filed by the petitioner for 1999 and 2000.

Information gleaned from the petitioner's federal income tax returns caused the director to deny the petition for the petitioner's inability to pay the proffered wage. According to the director, the IRS printouts that the petitioner submitted in response to the request for evidence related to the 1998 and 1999

years, not to the 1999 and 2000 years as claimed by counsel. The director noted that the petitioner's 1999 tax return showed a $206,295 loss in income and cash of $6,864. The director stated: "The petitioner is not and has not shown it has ever been a profitable operation." The director further stated that the petitioner is "highly dependent" on the foreign entity and operates more as "an unprofitable branch or agency office than [as] a business entity in its own right."

On appeal, counsel states that there was some confusion in the IRS computer system, which caused computations from the petitioner's 1999 tax return to appear in the printout for its 2000 tax return. The petitioner submits its IRS printout for the 2001 tax year, which according to counsel, reflects the petitioner's financial position as of March 31, 2001. According to counsel, this evidence reveals that the petitioner had the ability to pay the proffered salary at the time of filing the petition and continues to be able to pay the beneficiary's salary at the present time.

Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The I-140 petition was filed with the California Service Center on June 4, 2001 and, therefore, the petitioner must establish that it had the ability to pay the proffered wage as of that date. Accordingly, the petitioner's financial position during its fiscal year, which runs from April 1, 2001 through March 31, 2002, is relevant to this proceeding.

The Bureau notes that counsel claims on appeal that the proffered wage is $85,000. However, the I-140 petition clearly indicates that the offered salary is $93,400 per year. As there is no evidence to support counsel's claim, the Bureau shall consider the proffered wage to be $93,400 per year, as stated on the I-140 petition. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based upon evidence in the record at the present time, the petitioner has established that its net assets were sufficient to cover the proffered wage of $93,400 at the time the petition was filed. Accordingly, the director's decision to deny the petition, in part, on this basis shall be withdrawn.

The second issue to be discussed is whether the proffered position of a project leader is in a managerial capacity. The Bureau notes that the petitioner is seeking the beneficiary's services as a multinational manager, not as a multinational executive.

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.

At the time of filing the petition with the California Service Center, the petitioner described the proffered position as: "[The beneficiary] is charged with setting staffing levels on individual projects as well as developing the project budget. He continues to directly supervise software engineers and systems analysts." The petitioner also submitted an organizational chart, which showed the beneficiary, Ramakrishnan Ramachandran, working as a project leader under the direction of the vice president of engineering. The chart also showed an individual named R. Ramakrishnan working as a software engineer under the direction of one project manager.

The director did not find the initial documentation adequate evidence of the beneficiary's employment in a managerial capacity. Therefore, on December 10, 2001, the director requested evidence, to include:

- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific; list the education and employment qualifications for the position in the United States company. Include evidence that the

> beneficiary meets the petitioner's qualifications. Indicate exactly whom the beneficiary directs including their job title[s] and position description[s]. List all employees under the beneficiary's direction. Also, indicate [the] percentage of time spent in each of the listed duties. (Emphasis in original.)

In response, counsel stated, in part:

> Both in India and in the US [sic], [the beneficiary] has been serving in the capacity of Project Leader for [the petitioner], supervising and coordinating the activities of both onsite (in the US [sic]) and offshore (in India) project teams performing tasks related to the design, development and implementation of highly complex software development projects for large US corporate clients, which involves the day[-]to[-]day exercise of discretion in scheduling, resolving problems, and estimating completion time for each project phase. He is responsible for the management of project teams consisting of anywhere from three to ten information technology professionals, including systems analysts and software engineers. As a Project Leader, the beneficiary's primary responsibilities include overseeing the development and design of highly complex systems-level software packages and programs customized to perform tasks specific to each of the client's needs. He guides the work being performed . . . by personally supervising the team leaders on each project and indirectly supervising the professional members of each project team. He provides guidance to the team in the interpretation of policies and specifications, the assignment of tasks, the resolution of problems, and determining when adjustment[s] to staffing levels are required. . . . He is also responsible for directing all technical efforts leading to the successful configuration of hardware configurations, software systems, and applications programs. . . . The beneficiary is also charged with ensuring that workloads are properly distributed, assignment deadlines are met, and client expectations are fulfilled. He must provide budget and time estimates for each project . . . and must ensure that each project stays on schedule and within budget constrictions. . . . The remaining 10% of his time (4 hours per week) is spent directly supervising members of the project team in order to ensure compliance with client requirements, assessing job performance and writing personal evaluation reports on his team members.

The director determined that the proffered position was not in a managerial capacity for several reasons. First, the director stated that the proffered position was a first-line supervisory position "that is not over subordinate managers." Second, the director noted that the beneficiary was listed in the organizational chart as both a project leader and a software engineer, which according to the director, did not correspond to the beneficiary's job description. Additionally, according to the director, one listed duty of supervising a "team leader" did not comport with information on the organizational chart. Third, although the director implied that the beneficiary was supervising professional employees, the director concluded that the beneficiary was not managing these employees. Fourth, the director did not find it believable that the beneficiary supervises overseas project teams considering that the foreign entity has an adequate supervisory and managerial staff to handle this type of duty. Finally, the director concluded that the beneficiary was working as a software engineer and, "possibly," a first-line supervisor. The director did not believe that the beneficiary possessed the requisite authority over policies, day-to-day operations, and personnel, required of an individual employed in a managerial capacity.

On appeal, counsel states, in part, that the beneficiary qualifies for this immigrant visa classification as a functional manager because he "manages the critical function of directing and controlling the team leaders and engineers working at the specific project to which he is assigned." Counsel states that nothing in the beneficiary's job description indicates that he performs routine operational project activities as claimed by the director. Counsel also contends that, if the beneficiary is a first-line supervisor, he still qualifies for this immigrant visa classification because he supervises professional employees.

A review of the evidence in the record reveals that the director misinterpreted the beneficiary's role with the petitioner when stating that the beneficiary possessed no managerial authority.

The director noted apparent conflicting information between the organizational chart and the beneficiary's job description. As previously stated, the director noted that the organizational chart showed the beneficiary, [redacted] working as a project leader under the direction of the vice president of engineering, and an individual named [redacted] working as a software engineer. The director concluded that these two individuals were the same person - the beneficiary. However, the DE-6 forms in the record establish that the petitioner employs the beneficiary, [redacted] and an individual named [redacted] It is Ramkumar Ramakrishnan, not the beneficiary, who is listed on the organizational chart as a

software engineer.[1] Therefore, no discrepancies exist between information on the organizational chart and the beneficiary's job description.

The director's conclusion that the beneficiary does not possess managerial authority contradicts the evidence of record. The beneficiary's job description indicates that he has managerial authority over a component of the petitioner's operations, and makes independent decisions over the daily activities of this component. The director implied that the beneficiary supervised professional employees, but denied the petition, in part, because the beneficiary was not managing these professional employees. However, one element of the definition of managerial capacity states that the beneficiary must supervise and control the work of supervisory, professional or managerial employees. Contrary to the director's assertion, there is no requirement that the beneficiary must manage professional employees. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Furthermore, a first-line supervisor of professional employees does not disqualify a beneficiary from consideration as a manager. 8 C.F.R. § 204.5(j)(4)(i).

Based upon the above discussion, the petitioner has demonstrated that the position offered to the beneficiary is in a managerial capacity. Therefore, the director's decision to deny the petition on this basis shall also be withdrawn.

The third and final issue to be discussed is whether the beneficiary was employed by the foreign entity in a managerial capacity for at least one year in the three years immediately preceding his entry into the United States as an intracompany transferee.

At the time of filing the petition, the petitioner stated in an accompanying letter that the beneficiary had joined the foreign entity in March 1997 as a senior software engineer. According to the petitioner, in this position, the beneficiary: "[W]as responsible for overseeing teams, of between five and ten software engineers, systems analysts, and programmers in the development of our proprietary software products, customized for our corporate clients." The petitioner further stated that the beneficiary remained in this position until his transfer to the United States in May 2000.

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[1] According to the Form DE-6, [redacted] salary is less than the beneficiary's salary. This information would support a finding that [redacted] is employed as a software engineer, a position lower in the organizational hierarchy than a project leader.

On December 10, 2001, the director requested additional information regarding the beneficiary's position with the foreign entity, to include:

- Payroll records: Present copies of the foreign company's payroll records pertaining to the beneficiary for the year preceding the filing of the first petition for L-1 status. Specify when the beneficiary was hired, the positions that were held and why the beneficiary was selected for the position with the U.S. entity.

- Foreign Company's Organizational Chart: Submit a copy of the foreign company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level and annual salaries . . . for all employees under the beneficiary's supervision. (Emphasis in original.)

- Duties Abroad: Submit a more detailed description of the beneficiary's duties abroad. Be specific. Also, indicate [the] percentage of time the beneficiary spends in each of the listed duties.

In response, counsel submitted copies of the beneficiary's payroll records from the foreign entity to verify employment. Counsel stated that, as stated in the petitioner's letter that accompanied the petition, the beneficiary was hired in March 1997 and served as a senior software engineer until his transfer to the United States in May 2000. Counsel stated that the beneficiary's duties for the foreign entity mirrored his duties in the proffered position. Regarding the foreign entity's organizational chart, counsel submitted the requested chart. Counsel stated that the beneficiary's position was not reflected on this chart because he was no longer employed by the foreign entity, and that the foreign entity does not retain outdated organizational charts.

The director denied the petition on this basis because the petitioner failed to submit an organizational chart that showed the beneficiary's position with the foreign entity, and because the petitioner did not submit documentation of the beneficiary's employment from March 1997 through May 2000. According to the director, the payroll records submitted by counsel in response to the request for evidence were for the period from April 1, 1999 through February 29, 2000.

On appeal, counsel submits copies of payroll records for the period from April 1, 1998 through March 31, 1999. Counsel states that, along with the previously submitted payroll records for the period from April 1, 1999 through February 29, 2000, this evidence shows that the foreign entity employed the beneficiary for almost two years.

Regarding the organizational chart, counsel states that she stated incorrectly that it did not show the beneficiary's position with the foreign entity. According to counsel, the beneficiary is listed on this chart as "manager-consulting," and shows that the beneficiary controlled a program manager, a project manager, and several project leaders. Counsel submits a letter of appointment from the foreign entity to substantiate her assertion that the beneficiary held this position. Finally, counsel states that the beneficiary's job description, which is the same as the proffered position, should be given substantial weight in determining the beneficiary's role with the foreign entity because the job description is not contradicted by any evidence in the record.

The Bureau does not concur with counsel's assertion that the record is free of contradictory evidence regarding the beneficiary's position with the foreign entity. At the time of filing the petition, the petitioner stated that the beneficiary had been employed as a senior software engineer from March 1997 until his transfer to the United States in May 2000. On appeal, counsel submits a November 19, 1999 letter from the foreign entity, in which it informs the beneficiary of his promotion to the position of "Manager Consulting" effective July 1, 1999. Neither in the petitioner's initial letter of support nor in response to the director's request for evidence, was the Bureau informed that the beneficiary's job had changed from senior software engineer to manager-consulting prior to his transfer to the United States.

Additionally, although counsel states that the foreign entity's organizational chart indicates that the beneficiary supervised a program manager, a project manager, and several project leaders, a review of the chart belies counsel's claims. According to the chart, the beneficiary's position (manager-consultant), as well as the positions of program manager and project manager, have a direct reporting line to the vice president of product engineering. This chart does not show that the beneficiary supervised a program manager, a project manager, project leaders, or any other employee(s). Thus, counsel's claim that the beneficiary's job description in the proffered position is identical to his job description with the foreign entity is not credible. The beneficiary's job description for the proffered position, which was reproduced earlier in this decision, indicates that the beneficiary has supervisory authority over professional employees, among other duties. As the organizational chart does not illustrate that the beneficiary had supervisory control over other employees, the job

description for the proffered position cannot realistically depict the beneficiary's job responsibilities with the foreign entity.

The petitioner has not resolved the inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). There is no comprehensive description of the beneficiary's job as a manager-consultant to clarify his job responsibilities and his supervisory authority, if any, over subordinate employees. Furthermore, there is no explanation from the petitioner regarding why it neglected to inform the Bureau that the beneficiary was promoted to the manager-consultant position. Accordingly, the director's decision to deny the petition on this basis shall not be disturbed.

The Bureau notes that, even if the petitioner could establish that the position of manager-consultant was in a managerial capacity, the beneficiary would not have been employed in a managerial capacity for the required period of time. 8 C.F.R. § 204.5(j)(3)(i)(B). According to the letter of appointment, the beneficiary was promoted to the position of manager-consultant in July 1999 and he was transferred to the United States less than one year later, in May 2000. There is no evidence presently in the record to establish that the position of senior software engineer, which the beneficiary held prior to his appointment to manager-consultant, was in a managerial capacity.

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 overcome the denial of the petition on the grounds that: (1) it does not have the ability to pay the proffered wage of $93,400; and (2) the proffered position is not in a managerial capacity. However, the petitioner has failed to overcome the director's determination that the foreign entity did not employ the beneficiary in a managerial capacity for at least one year in the three years preceding his entry into the United States as an intracompany transferee.

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